Supreme Court, U.S.
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IN THE

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Supreme Court of the United States

ALLEGRA D. HEMPHILL
Petitioner,

v.

THE PROCTER & GAMBLE COMPANY,
and KIMBERLY-CLARK CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The district court of Maryland prohibits individuals from participating in patent infringement cases. If the judge is choosing not to defend the Constitution and more specifically, chooses to dismiss the First Amendment to the US Constitution, the patent law Title 35 U.S.C. §112,¶2 is automatically considered not relevant.

Consistently applying laws enacted by Congress defends the Constitution which protects the rights of persons in patent cases. The question in this patent infringement case involves two-issues:

A) Is the statute, Title 35 United States Code §112, paragraph 2, relevant law in a patent case?

B) Is there a way, to preserve the statute Title 35 U.S.C. §112,¶2, consistent with the constitutional right 'to petition the court for a redress of grievances' ?

PARTIES TO PROCEEDING

All parties to this proceeding are identified in the caption. Kimberly-Clark Corporation and The Procter & Gamble Co. are corporations and there is no other parent or publicly held company owning 10% or more of the corporation's stock. [1]

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OPINIONS /CITATIONS

The unsigned order of the court of appeals for the Federal Circuit in case no. 06-1300, dismissing the appeal is reprinted in the Appendix ("App.") at 1A.-3A. The unsigned and unreported order of the court of appeals for the Federal Circuit denying the petition for reconsideration is at App. 4A.-5A.

The final judgement order and opinion of the district court denying the petition is reprinted at App. 6A-9A. [1]

The order and opinion of the court of appeals for the federal circuit in case no. 03- 1463, 2004 WL 74620 (Fed. Cir. Jan. 15, 2004), by Randall R. Rader, William C. Bryson and Arthur J. Gajarsa Circuit Judges, and authored by Randall Rader is at App., 12A-17A. The order and opinion by judge Deborah K. Chasanow in DKC 2002-3736, is reported at 258 F. Supp. 2d. 410 (D. Md. 2003) and is at App. 21A-36A.

In the United States Patent and Trademarks Office, the signed opinions, office actions and rulings by Patent Examiners regarding the United States Letters Patent Number 4,557,720 are a matter of public record. See App. 41A-71A.

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[1]The district court did not issue an order or memorandum opinion dismissing the rehearing.

JURISDICTION

On May 1, 2006, the United States Court of Appeals for the Federal Circuit dismissed the right to appeal in case no. 2006-1300, before the Appellant's formal principal brief was even due.

On June 27, 2006, the order for reconsideration was dismissed on June 27, 2006. 28 U.S.C. §1295(a).

On February 13, 2006, the district court entered its decision denying the patent infringement case under 28 U.S.C. §1338.

This Court has jurisdiction under 28 U.S.C. §1254(l).

CONSTITUTION

Article I, Section 8, clause 8 in the Constitution of the United States. US Const., Amend I.

STATUTES AND REGULATIONS

The texts of the following are in the Appendix.

Title 35 United States Code, Section 112, paragraph 2, is at 39A.

Title 42 United States Code §1981 (a) is at 40A.

STATEMENT OF THE CASE

Introduction

Protected under the Constitution of the United States, the right *' to petition the [courts] for a redress of grievances'* is, one of the most fundamental individual rights that an American considers 'supreme.' In a patent case, having this right denied is egregious. The lower court failed to acknowledge the requirements of Art. I Section 8 clause 8. The lower court failed to recognize the patent laws passed by Congress under Title 35 U.S.C. §112, ¶2 even though the petitioner more than satisfied the standards.

The federal patent laws are **mandatory in patent cases.** They are indispensable. A statutory interpretation under Title 35 U.S.C. §112, ¶2, **is** "due process under the law". Courts *must comply* with this rule of law:

> Title 35 U.S.C. §112,¶ 2 **requires** [Ms. Hemphill] to *particularly point[ing] out and distinctly claim[ing]... which the applicant [Ms. Hemphill] regards as [Ms. Hemphill's] invention."*

Plaintiff Hemphill, being the applicant, **is entitled** to bring evidence to prove the infringement. Yet, the lower court challenged the above law, by denying the applicant access in the court and prohibited the applicant from participating. The court avoided the law, so that the rights of an individual applicant are not protected. The district court's favor has given a *select* interpretation, that is 'half-baked' and not the 'thorough' statutory interpretation required under the law. The district judge deprived Plaintiff

Hemphill of her right to show her patent is infringed . This decision-making process, has taken the control away from the applicant's ability *to point out and distinctly claim her covered invention* and *hands over* the applicant's entitlements to corporations simply because corporations represent 'big business.' The lower court's judgement makes clear that unless Plaintiff Hemphill is either a corporate entity or becomes incorporated, her case of patent infringement will not be heard.

The rights of individuals will continue to be denied by lower courts that approach cases for patent infringement with a closed mind. This Court should take this case to vindicate the rights of applicants who seek to exercise their constitutionally guaranteed individual right to petition the court for redress of his or her grievances.

District Court Decision

This is a patent case. The cause is 28:1338 Patent Infringement. On June 15, 2006, Ms. Hemphill filed her motion for Final Judgement requesting the district court to apply patent law 35 U.S.C. §112, ¶2 in a patent infringement case. On February 13, 2006, the district court judge Deborah K. Chasanow rendered her final judgement and opinion.

Proscribed by statute, the lower court conspicuously fails to even mention the statute 35 U.S.C. §112, ¶2 in its opinion below. 6A-9A. This distinction is particularly egregious here. The district court has intentionally avoided the patent law to prohibit the applicant from participating in a patent infringement case which is abuse of discretion. The district court writes:

"Presently pending in this case is the unopposed motion...the court now rules." "The court will deny the motion" See App. at 7A.

Plaintiff Hemphill filed the Fed. R. Civ. P. Rule 59(e) to prevent a manifest injustice and to correct a clear error of law. Failing to issue any order or memorandum opinion, the district court dismissed the rehearing on March 8, 2006.

Court of Appeals for the Federal Circuit Decision

The court of appeals for the federal circuit violated protocol. In case no. 06-1300, the federal circuit dismissed the Appellant's appeal, before the Appellant's formal principal brief was even due: *A formal brief is due 60 days after the case is docketed in court cases* See Rules of Practice. Guide for Pro Se Petitioners and Appellants Paragraph 14. Formal briefs. pg. 137

See Federal Circuit Rule 27(f) pg. 46:

"A motion to dismiss for lack of jurisdiction or remand should be made soon after docketing as to grounds for the motion are known. ***After the appellant or petitioner has filed the principal brief,*** the argument for dismissal should be made in the brief of the appellee or respondent."

Recent revisions to the Federal Circuit Rule 27(h) dated March 9, 2006, probably created confusion in the Clerk's Office that violated the Appellant's ***right to appeal***. The corporate Appellee's filed motions that were "opposed" and not within Federal Circuit Rule 27(h): Delegation of authority to the Clerk:

The clerk is authorized to act on "unopposed motions" or "motions consented to" .

Violating protocol does not avoid the constitutional issue nor invalidate the statute. The federal circuit judges Bryson Gjarsa and Prost denied the motion for reconsideration making this case exceptional on June 27, 2006. The court's *break with* protocol and normal court procedure *forces* the grant of a writ of certiorari. The Jurisdiction in the Supreme Court is invoked under 28 U.S.C. 1254(l).

STATEMENT OF THE FACTS

PTO HISTORY

In the United States Patent and Trademark Office, the claims in the Hemphill '720 Patent were carefully scrutinized and

> "[r]eviewed by Patent Examiners, quasi-judicial officials trained in the law.... having expertise in interpreting the [prior art] references and to be familiar with their work with the level of skill in the art and whose duty it is to issue only valid patents." Markman v. Westview Instruments, Inc., 52 F3d. 967, (Fed. Cir. 1995) 986 (en banc), aff'd.

In the PTO, six claims were filed in the patent application 434,828 on October 18, 1982. See App. at 41A-42A.
Claim 5 and claim 6 in patent application 434,828 were also claim 5 and claim 6 in the file wrapper 619,684 filed June 11, 1984, which are now claim 1 and claim 2 in the United States Letters Patent 4,557,720 ("the Hemphill '720 Patent").
During the prosecution phase, claim 5 and claim 6 were always safeguarded which protected the claims from 'material directed to

a non-elected species'. See paper 7 at 49A. and see Paper 10 at 54A. [2] *Hemphill's invention* in claim 5 and claim 6 that are now claim 1 and claim 2 in the '720 Patent are reading the same and exact way as they did in the patent application 434,828 filed on October 18, 1982. See 41A-42A.

There is no legal basis to unfairly limit the independent claim 1 in the '720 Patent and there is no justifiable reason to narrow the scope. The entire record in the United States Patent and Trademark Office *goes to show* that no ambiguity exists in the independent claim 1 and thus, there are no restrictions for this Court to impose. The PTO performed one REEXAMINATION **on** May 20, 1998 **re: Hemphill 4,557,720 Patent *versus* prior art Srinivasn et al, Patent 3,973,567.** The PTO is where the most expert opinion exists. The reexamination ensures that the Commissioner issues a certificate setting forth the results of the proceeding and the content of the patent. See Reexamination Certificate. See 70A-71A. The PTO concluded reexamination by resolving the fact that

> "Claims 1 and 2 are confirmed."
>
> "NO AMENDMENTS HAVE BEEN MADE TO THE PATENT"

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[2] For prosecution on the merits, the Examiner required a species election in the PTO Paper # 4at 45A-46A. The PTO rulings and decision for Species #1 were not directed to claim 5 and claim 6 because these claims were directed to a non-elected Species #4. For this reason, the claims 5 and 6 were in **safekeeping** during the Examiner's consideration of Species #1. See PTO Paper #7 at 49A-51A and PTO Paper #10 at 53A-57A.

On November, 18, 1983, the applicant being Ms. Hemphill, plainly and unequivocally instructed her attorneys at Cushman Darby Cushman to file and list structure in prior art patents with the United States Patent and Trademark Office.

The **Information Cited By Applicant in PTO-1499** was reviewed, considered and accepted on April 3, 1984 by Patent Examiners and double-checked on December 13, 1984.

> See "Attached is form PTO-1499 listing additional US Patents to be brought to the Examiner's attention for his review and consideration." See 43A- 44A.[3]

Both the PTO and Ms. Hemphill *know* that the structure Ms. Hemphill *'particularly points to and distinctly claims'*, is the invention clearly covered in her '720 Patent. The independent claim 1 **must be considered and reviewed** by a capable judge or judges exhibiting a wide mental grasp of knowledge. Claim 1 has **comprehensive meaning because** the applicant regards her

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[3] Prior art Bower 4,159,718 patent (two sheets of a thin plastic material...paper tubular section) at Col. 1, ll. 29-31, ("..rectangular sheets ..") at Col. 1, ll. 57-58. Vol II, 197A.

Prior art Johansson 4,165,942 patent: ("protective cover which can be opened up at one end ...and folded back to expose..") in Col. 1, ll. 48-55. Vol. II, 201A.

Prior art Laker 4,175,439 patent: ("...flat flexible plastic pouch...open at one end which permits closing and sealing) in Col. 2, ll. 6-7 (...pulling the sides apart to open the container" in Col. 2, ll. 22 Vol II, 204A.

Prior art Schuster 4,157,709: "comprises an outer sheath, an intermediate tube slidable there within..."). Col. 2, ll. 60-66. Vol II, 190A.

invention as the words in the claim 1 reads:
*'A vaginal swab **comprised of** an outer housing...a core member ...and adsorbent member'* in Col. 6, ll.60 in the '720 Patent. "The word "comprising" in patent law is an open-ended word, one of enlargement **and not of restriction**. See Lipscomb's Walkers On Patents Third Ed., §21:17 Construction and Validity, pg. 320-321. This reasoning is clearly settled in the Hemphill '720 patent itself which provides:

> "[i]t is to be understood that the invention is **not to be limited** to the disclosed embodiment...**which scope is to be accorded the broadest interpretation so as to encompass all such modifications and equivalent structures."** in Col. 6, ll. 49- 58 in the '720 Patent.

The PTO clearly decided the language in claim 1 recites *A vaginal swab **comprised of, and*** "[t]his term "comprised of" denotes a patent claim as being "open" meaning that the recitation of **structure** in the claim is open to additional **structural elements** not explicitly mentioned." Moleculon Research Corp. v. CBS, Inc 793 F2d. 1261 (Fed. Cir. 1986) 1271.

COMPARING THE 'PROPERLY CONSTRUED' CLAIM 1 WITH DEVICES ACCUSED OF INFRINGING

Courts determine "whether the language at issue has a plain and unambiguous meaning with regard to the **particular dispute** in the case." Robinson v. Shell Oil Co., 519 U.S. 337, **340,117 S. Ct. 843**, 136 L.Ed. 2d. 808 (1997). To determine the meaning, courts **must at least, read the claims.** This Court, therefore, must be mindful that the PTO having the most expert opinion resolved the term "vaginal" based on **language in the claim** that actually reads to the "structure"in the claims at the time of invention; since filing the patent application in 1982.

CLAIM 1 READS TO:

> A **vaginal** swab **comprised of an outer housing** having a **closed and open end on opposing ends thereof,**
>
> **said housing** including an **annular band** defining said open end and a plurality of **frangible seams** that together define a pair of removable members and a pair of housing segments hingably secured to said annular band following removal of said removable members,

At the time of invention, the key issue was the meaning of "vaginal" **in the claim.** The claim clearly did not read to any human body parts such as "vagina genitalia" for the court to limit the claim. There is no such language in claim 1 for the court to narrow the claim to the "genital vagina" so that a case, covering

or sheath as "outer housing" really is the plausible choice. [4]

In fact, trained officials in the PTO preordained **the language in the claim** reads to "structure". By contrast, the lower court interprets *vaginal swab* based on "use". The lower court is *holding* "internal use" directly ***against*** official actions, rulings and decisions by the United States Patent and Trademark Office.[5] Therefore, before this district judge covertly 'subverts the balances' in the United States Patent and Trademark Office, a higher court must be amenable to include "the external uses". In this way, neither "internal use" nor "external use" becomes an unnecessary restriction and/or improper limitation **on the claim.** In point of fact, the recitation "A vaginal swab *comprised of*" in the independent claim 1 is **intended to include** rather than exclude". Georgia-Pacific v. US Gypsum Co. 195 F3d. 1322 (Fed. Cir. 1999). 1327. It is now permissible for this Court ***to include external use*** **along with the lower court's interpretation for**

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[4] Webster's New Collegiate Dictionary 1281, **(1979)**, was the available reference material that clearly defined the word "vaginal" as
1. **of, or relating to a theca**
and the secondary dictionary definition was 2. of, relating to, or affecting the genital vagina.

The word "theca" is still defined in the American Heritage College Dictionary, 1405 (3rd ed. 1993) as a **case, covering or sheath**. The word "sheathed" means 'to encase or cover with' *quoting* American Heritage College Dictionary, 1254 (3rd ed. 1993).

[5] The district court construed "vaginal swab" as "a small piece of absorbent material attached to the end of a stick or wire and used for cleansing or applying medicine," meant to be used within the vaginal canal. *citing American Heritage Dictionary* 1810 (3d ed. 1992); see also *Dorland's Medical Dictionary* 1617 (28th ed. 1994). 32A.

internal use and thus BE. in compliance with the authority in the United States Patent and Trademark Office as well as, comply with the laws passed by Congress under Title 35 U.S.C. §112, ¶2.

CLAIM 1 READS TO:

> a **swab** core member having a predetermined exterior shape, said **core member** having an annular base with an outer diameter equal to the inner diameter of said annular band **and an adsorbent member** secured to said core member, said core member being **secured within said housing** so that said **adsorbent member is enclosed therein** in Col. 6, ll. 66 through Col. 7, ll. 5

CORE MEMBER

Unlike claim 2, the independent claim 1 does not have the limitation of 'means plus function' language. Claim1 does not limit nor restrict the core member to be a one-piece unit with housing means. See 'core member can be constructed **either** in segments **or** as a one-piece unit' at Col. 2, ll. 5-7in the Hemphill '720 Patent Claim 2 reads "*core member being **secured to** said housing means*" in Col. 8, ll. 2-3 in the '720 Patent, whereas, claim 1 reads: "*core member being **secured within** said housing*" in Col. 7, ll. 3-4 in the '720 Patent.

The Hemphill '720 Patent clearly provides *materials* for the court to determine a core member.[6] The PTO allowed prior art

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[6]"Core member" was construed by the court as "a fairly rigid core member with an annular band or ring at its base that can fit into the band or ring of the outer housing," See 32A.

Bower 4,159,718 patent showing:
"a thin plastic flexible sheet material made from polyolefins or thermoplastics in ("..rectangular sheets ..") at Col. 1, ll. 57-58, **as well as,** the prior art Fielding 3,731,682 patent showing ("knitted or woven material such as yarn, thread, string or cord") in Col. 4, ll.35-40. Reexamination is clear-cut proof, that the above structures are allowable and, are disclosed in the Hemphill '720 Patent:

> "It is agreed that the reference to Srinivasn et al **has structure** that may read on claim 2 such as a core member surrounded by a layer of porous material..." 66A.

The PTO *goes to show* this Court, that a core member in the Hemphill '720 patent is a **flexible sheet, a string, and/or cord.** During reexamination, the PTO confirmed a flexible sheet as core member in claim 2 via the prior art '567 Patent: Col. 4 ll. 11-12 : ("fluid impermeable sheet material such as polyethylene, polypropylene, cellophane and other similar films") . 66A.
It is for this reason 'a core member that is either rigid or fairly rigid is interpreted as being 'extremely *compact* and easily manufactured so as to be portable, disposable carriable and usuable' at Col. 3, ll. 16-18. Thus, the federal circuit affirmed the district court's extrinsic evidence as ***inclusive*** because

> "[t]he Supreme Court does not limit the doctrine of equivalents "to equivalents that are disclosed within the patents itself, reasoning that the **"proper time for evaluating equivalency . . . is at the time of infringement,** not at the time the patent was issued." Warner- Jenkinson

117 S. Ct. 1040 FestoCorp. v. Shoeketsu Kinzoku Kogyo Kabushiki 234 F3d. 558 (Fed. Cir. 2000) 566. [7]

Accordingly, on the devices accused of infringing, ***folding over*** the flexible sheet forms the annular band which is consistent with the district court's above claim construction for this term.

ADSORBENT MEMBER

The court agreed to, at least **one** layer of porous material in claim 2, whereas, the independent claim 1 has an adsorbent member which is at least **two** fibers working together helps to improve absorbing. [8] The adsorbency characteristic completely changes the look and behavior. "[I]t is important to employ a highly absorbent material and accordingly, any such materials could be used as the absorbent material" at Col. 3, ll 65-68 in the Hemphill '720 patent. "[T]he patentee did not conceal or fail to disclose this correlation, but instead featured it as the centerpiece of [her] invention" in Metabolite Lab., Inc. v. Laboratory Corp. 370 F3d.1354 (Fed. Cir. 2004) 1367.

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[7] The range of equivalency is determined between the PTO and Federal Circuit. The PTO decided and confirmed the intrinsic evidence in claim 2 via prior art disclosed in the '720 patent that shows (at least two fibers of absorbent material) (on a flexible sheet).

The federal circuit affirmed extrinsic evidence via structure from the *American Heritage Dictionary* 1810 (3d ed. **1992**); and also in *Dorland's Medical Dictionary* 1617 (28th ed. **1994**) as (at least one layer of absorbent material) (on a stick) (on a wire). 30A-31A.

[8] The PTO cited prior art Alvarez Patent #4,177,811 to clarify *the way of* ***absorbing***. 51A and 56A.

OUTER HOUSING

Claim 1 reads 'removable members', however, the federal circuit affirmed an outer housing in claim 1, is reading **in the first position** for enclosing and protecting *"so that said adsorbent member is enclosed therein."* in Col. 7, ll. 4-5 in the '720 Patent. [9] This concurs with the PTO requiring that an outer housing in claim 1 must be distinct: *"an open end opposite a closed end, an annular band and frangible seams."* 68A.

Accordingly, on the accused devices Always® and Kotex ®, an outer housing ***folds over,*** and thereby, encloses to safely protect *'said core member being secured within said housing so that said adsorbent member is enclosed therein'* **which agrees with the words in claim 1 reading in first position** in Col. 7, ll. 3-5 in the '720 Patent.[10] Unlike claim 1 , an outer housing in claim 2 reads to the second position which is "essentially peeled away from an enclosing protecting relationship" at Col. 2, ll. 19-21 in the '720 patent.

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[9]The court construed the term "outer housing" as a device that serves as a handle structure for the use of the swab and is not designed to be removed and thrown away."See 32A

[10]The devices accused of infringing are individually wrapped. ***Folding over*** Always® and Kotex®, forms the *annular band* which is handle structure that is not designed to be removed or thrown away in the first position.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE FOURTH CIRCUIT AND THE NINTH CIRCUIT.
THE DISTRICT COURT OF MARYLAND DECIDED THE STATUTE 35 U.S.C.§112,¶2 IS NOT RELEVANT IN A PATENT CASE, WHICH CONFLICTS WITH THE DECISION OF THE NINTH CIRCUIT.

As a result of the lower court's decision not to apply the law, the United States Court of Appeals for the Federal Circuit has decided an important federal question that has not been, but should be, settled by this Court, and decided this important federal question in a way that conflicts with relevant decisions of this Court. That question is whether the statute 35 U.S.C. §112, ¶2, is unconstitutional.

Courts apply the United States Patent Laws *uniformly* throughout the nation. Contrary to the mandate of Congress, the district court judge Deborah K. Chasanow, decided not to apply the law and avoided the patent law in a patent case. This lower court judge is challenging the statute by *breaking away* from the fair and usual course of proceedings. A trend beginning in the district court of Maryland decides patent cases strictly on a *mail-in* basis. There are no in-court proceedings. Parties must be corporations in order to have their rights declared. Persons who seek the ability to exercise their constitutionally guaranteed

individual right to petition the court for redress of their grievances are repeatedly denied. Parties who are individuals never see the district court judge and never speak with the presiding district court judge. Law-abiding citizens that are true inventors who wish to protect their interests, as well as, their constitutional and statutory rights are dismissed from the judicial system.

As the gatekeeper, the district court judge *let in* corporate Defendants so that their case of non- infringement was heard.[11] The court and corporate Defendants agreed to 'properly construed terms' for the independent claim 1 in Ms. Hemphill's '720 Patent. By her own admission, the district court judge Deborah K. Chasanow, *knowingly violates* Plaintiff Hemphill's constitutional right 'to petition the court for a redress of her grievances.' As proof,

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Paper 18 Notice of attorney appearance for KC
Paper 19 Motion and Order for KC attorney appearance pro hac vice
Paper 20 Motion and Order for KC attorney appearance pro hac vice
paper 21 Motion and Order for KC attorney appearance pro hac vice
Paper 22 KC Summary Judgement of non-infringement 2/11/03
Paper 23 P&G Summary Judgement of non-infringement 2/11/03
Paper 25 K-C and P&G Defendants Joint **Motion to Stay Discovery 2/11/03**
Paper 26 Motion and Order for P&G attorney appearance pro hac vice2/12/03
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Paper 29 Notice of P&G attorney appearance 2/12/03
Paper 30 Order to Plaintiff to Show Cause for Stay Discovery 2/12/03
Paper 31 Order to Stay Discovery 2/21/03
Paper 32 Hemphill Response to summary judgement of noninfringement 2/25/03
Paper 33 P&G Reply 3/11/03
Paper 34 K-C Reply 3/12/03
Paper 35 Memorandum Opinion on April 15, 2003,
and Paper 36 Order to close this case on April 15, 2003.

during final judgement the district court writes:

> "On April 15, 2003, this court granted the motions of Defendants Kimberly-Clark Corp. and Procter & Gamble Co., for summary judgement of non-infringement. (Paper 36). In the April 15, 2003, Order, the court specifically stated: "Judgement BE, and the same hereby IS, Entered in favor of Defendants Kimberly-Clark Corporation and The Procter & Gamble Co., and against Plaintiff Allegra D. Hemphill." The court also ordered the Clerk to transmit copies of the Order and the Memorandum Opinion (paper 35) to Plaintiff and counsel for Defendants, **and to close the case.**" See 8A.

The district court judge *closed the case prematurely, in the* above memorandum opinion Paper 35. See App. at 23A-36A. In the above Paper 36, Judgement against Plaintiff Hemphill was unreasonable. See App. at 22A. Before issuing any Judgement against the Plaintiff, the district court judge must write the Order for the Plaintiff to Show Cause.[12]

Plaintiff Hemphill first learned the independent claim 1 in the Hemphill '720 Patent was 'properly construed' in the memorandum opinion Paper 35 on April 15, 2003:

> "These are the definitions against which the accused products must be compared to determine whether they infringe on claim 1 of the '720 patent." See 32A-33A.

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[12] The corporations filed their joint motion to Stay Discovery on February 11, 2003. The court ordered the Plaintiff to Show Cause on February 12, 2003. Then, the court issued the Order and Judgement on February 21, 2003. See appendix 37A and 38 A.

In paper 35, the district court established the legal standard for Plaintiff Hemphill *to prove* the literal infringement at 33A:

> "A claim of literal infringement **requires proof** that the accused devices meet every limitation **of the properly construed claims**." *citing* Gentry Gallery, Inc. v. Berkline Corp., 134 F. 3d. 1473, 1476 (Fed. Cir. 1998). See 33A.

On this same day, and at the same time the district court notifies Ms. Hemphill about the properly construed claim 1, above at 33A, the court erroneously presumed *the case was closed*, below at 34A.:

> "Plaintiff has failed to establish that the accused products literally infringe upon her '720 patent." See App. at 34A.

This is wrong. At no point in time was Plaintiff Hemphill permitted to give evidence to prove her case of patent infringement once the claim was 'properly construed.' This is egregious. The petition for patent infringement is actually being dismissed in the memorandum opinion Paper 35 between the above pages 33A and 34A, which violated the constitutional right below:

> "Accordingly, the court finds that no reasonable jury could find there to be equivalence between the accused products and Plaintiff's invention." See App. at 36A.

It should be clear to this Court, that the lower court judge already made up her mind to rule *against* the Plaintiff in the memorandum opinion in Paper 35. For this reason, no hearings of any kind were deemed necessary. See 'no hearing deemed

necessary in Paper 35 at 23A and see 19A and 8A. The decision the lower court was going to make against the individual Plaintiff was made with a closed mind regardless to any laws passed by Congress, and with no regard for any intrinsic evidence from Plaintiff Hemphill. The lower court had no justifiable reason for its failure to issue the *order to show cause.* The district court failed to provide Plaintiff Hemphill with a forum 'to particularly point to and distinctly claim her invention' under the law 35 U.S.C. §112, ¶2. The court's redress of Ms. Hemphill's grievance for the above literal infringement was dismissed because the lower court failed to apply the law. These are facts the district court judge cannot deny.

The judicial process in the Maryland district court, is in conflict with the ninth circuit. In the ninth circuit, it is permissible for both sides, the Plaintiff and the Defendant, to participate in the court proceedings. In point of fact, it was after extensive submissions by the parties and numerous preliminary findings by the district court of Northern California, that the court issued summary judgement of non-infringement Techsearch, LLC. v. Intel Corp. 286 F.3d. 1360 (Fed. Cir. 2002)1363. The district court judge Chasanow, clearly 'got ahead of herself' when she erroneously assumed that Plaintiff Hemphill could not particularly point to the intrinsic evidence to prove her claims are infringed. Yet, Ms. Hemphill, being the applicant under the law, is capable of particularly pointing to the intrinsic evidence which is the prior art disclosed in her '720 patent to distinctly claim the invention. See the requirements under 35 U.S.C. §112, ¶2 at 39A.

The lower court's brazen-faced judgement in paper 36, was meant to show favoritism for corporate Defendants, but the Judgement is *above* the laws passed by Congress under 35 U.S.C. §112, ¶2 and *against* the rulings and decisions in the PTO; in violation of the Constitution of the United States. The Plaintiff's first amendment right was violated when the lower court dismissed the nature of the suit and cause for patent infringement 28:1338. The lower court intentionally prohibited Plaintiff Hemphill from participating in the case.

However, keeping the 'case closed' during this final judgement is the 'obvious error':

> "Plaintiff seems to assert that the court's grant of summary judgement of non-infringement for Defendants is in some way separate and apart from any ruling on her claims and case for patent infringement , which she contends are still pending. Plaintiff is mistaken." See App. at 9A.

This is unreasonable. The district judge is abusing her discretion. Ms. Hemphill is being deprived of her right and her responsibility to show that her claims are infringed. Ms. Hemphill is once again being 'prejudged' and 'misjudged', simply because she is an individual citizen and not a corporation.

Undeniably, the corporate Defendants collaborated with the district court judge to 'properly construe' the independent claim 1. Based on the claim construction given, Ms. Hemphill and this Court ***are now compelled*** to fulfill the laws enacted by Congress. After all, the Defendant corporations are not applicants under the law. They do not speak for the applicant and they do not represent the

applicant[13]. Here, the question becomes, ***when*** is the law deemed relevant, for the court to apply the law. At some point in time, courts *must comply* with the rule of law. Clearly, Ms. Hemphill is *entitled to* the full and equal benefit of 'particularly pointing to and distinctly claiming the covered invention' *because it is required under the law* 35 U.S.C. §112, ¶2 in patent cases.

Plaintiff Hemphill, therefore, sought to prevent a manifest injustice and to correct a clear error under Fed. R. Civ. P. 59(e). The request to amend the district court's judgement by *applying the law* is reasonable.

> "The federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits." White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 451 (1982). 19A

In patent cases, "[t]he trial court's inherent search for the truth is the basic building block by which the judicial process maintains its credibility within the fabric of our society." Techsearch, LLC. V. Intel Corp. 286 F.3d. 1360 (Fed. Cir. 2002). 1378. The independent patent claim 1 clearly and categorically provides for: A vaginal swab ***comprised of*** ...an outer housing...a core member ...an adsorbent member. In patent law, the claim language [*comprised of*] defines the bounds of claim scope." Bell Communications Research Inc. v. Vitalink Communications Corp. 55 F3d. 615, 619-20 (Fed. Cir. 1995). The federal circuit judges Bryson, Gjarsa and Radar specifically affirmed a collateral estoppel

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[13]The corporations do not have a patent that covers the products accused of infringing.

citing Georgia-Pacific Corp. v. United States Gypsum Co., 195 F3d. 1322, 1331 (Fed. Cir. 1999). See App. at 15A. A careful reading of the canons and rules in this above case law ***told*** the district court judge that the recitation "A vaginal swab *comprised of* " in claim 1 is intended to include rather than exclude. The transitional term *comprised of* is inclusive ..." See Georgia-Pacific v. US Gypsum Co. 195 F3d. 1322 (Fed. Cir. 1999). 1327. "*Inclusive*" means that the structural claim is covering completely, or covering broadly. **"The actual words of the claim are the controlling focus."** "The claim construction inquiry, therefore, begins and **ends in all cases with the actual words of the claim."** Reinshaw PLC v. Marposs Societa per Azioni, 158 F3d. 1243, 1248 (Fed. Cir. 1998).

It is entirely illusory for a district court judge not to know or pretend to be completely unawares that "[t]he term '*comprised of*' is a **term of art and as such affects the legal scope of a claim,**" "which scope is to be accorded the broadest interpretation so as to encompass all such modifications and equivalent structures" in Col. 6, ll. 49- 58 in the Hemphill '720 Patent. See Moleculon Research Corp. v. CBS, Inc 793 F2d. 1261 (Fed. Cir. 1986) 1271. Prior art structure that is actually disclosed in Ms. Hemphill's '720 Patent itself, has not yet been considered, but must be reviewed for the courts to be in compliance with the official rulings in the PTO and comply with the laws passed by Congress. In keeping with ninth circuit law, this term "*comprised of*" is the true *turning point* in a patent case. It is a "specific claim limitation that cannot be ignored as insignificant or immaterial in determining infringement." Techsearch, LLC. V. Intel Corp. 286

F.3d. 1360 (Fed. Cir. 2002). 1378 . A better understanding of this term *"comprised of"* changes the outcome of the case from the non-infringement issue into the infringement issue.

Even if the district judge is marginally skilled in the prior art and not specialized in the patent law, courts know that prior art disclosed in the patent, is in fact, intrinsic evidence *at the time of invention.* Therefore, prior art disclosed in the Hemphill '720 Patent shall not be separate nor apart from any previous rulings, but rather, it should have been considered first and the extrinsic evidence must be ***inclusive.***[14] It is for this reason, judgement in this fourth circuit is in conflict with the ninth circuit court's standing "that evaluations of the **prior art requires consideration**.." Techsearch, LLC. V. Intel Corp. 286 F.3d. 1360 (Fed. Cir. 2002) 1369. The Maryland district court judge Chasanow seemingly appears to have her priorities 'backwards.' [15]

With all due respect, "[the district court] judge is not usually a person conversant in the particular technical art involved and is not the hypothetical person skilled in the art to whom a

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[14] Intrinsic evidence is the prior art disclosed in the '720 patent that shows (at least two layers of absorbent material) (on a flexible sheet, string and/or cord).

Extrinsic evidence is structure from the *American Heritage Dictionary* 1810 (3d ed. **1992**); and also in *Dorland's Medical Dictionary* 1617 (28th ed. **1994**) as (at least one layer of absorbent material) (on a stick) (on a wire).

[15]The Plaintiff is usually first and before the Defendant in the proceedings. The intrinsic evidence is usually considered first and before the extrinsic evidence. The time of *invention* is usually first and before the time of *infringing*.

patent is addressed." Markman v. Westview Instruments, Inc., 52 F3d. 967, (Fed. Cir. 1995) 986 (en banc), aff'd. Claims are written to one skilled in the art at the time of invention. "It is the court's task of ascertaining the meaning of claim terms to one of ordinary skill in the art at the time of the invention." Moba v. Diamond Automation , Inc. 325 F3d. 1306 1315 (Fed. Cir. 2003). At the time of invention, Examiners in the United States Patent and Trademark Office are the most skilled persons in the ordinary art. They *know* "how to" read the claims and they let the language in the claims define the invention. Thus, the district court's extensive search at the time of infringing, beginning in 1992, is in fact "inclusive" because the time of invention is 1982. The district court already considered extrinsic evidence in agreement with the corporate Defendants, however, this Court must consider the intrinsic evidence to coincide with the authority in the PTO. [16]

Ultimately, this Court, has accountability within its power and control over these real failures in the lower court. The role of a judge is to apply the law. Yet, the responsibility of the lower court to apply patent law, in a patent case, is repeatedly being ignored and neglected. The appearance of impropriety arises when courts fail to follow the rule of law. It appears the district court judge is *hiding to conceal* intrinsic evidence, because **the prior art structure, actually disclosed in the Hemphill '720 Patent, is, in fact, consistent with the devices accused of infringing.**

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[16] The public needs to know the distinctions between the two independent claims. The public has a right to know how *'materials used'* actually determines "the use", as well as, understand what the '720 patent meant by 'a fairly rigid core member.' See the above Statement of the Facts.

For this reason, the district court's final judgement was contrary to the court of appeals for the federal circuit's opinion on January 15, 2004. See App. at 14A.- 17A. The Federal circuit judges Bryson, Gjarsa and Radar affirmed summary judgement of non-infringement *with the stipulation* that "identical claim terms cannot be given a different meaning in different claims of the same patent **unless the patent [intrinsic evidence] clearly provides otherwise."** See Georgia-Pacific Corp. v. United States Gypsum Co., 195 F3d. 1322, 1331 (Fed. Cir. 1999). See App. at 17A.

Clearly, the United States Letters Patent 4,557,720 legally and rightfully belongs to Ms. Hemphill. She is the only party in this case with a patent that covers the device accused of infringing . She has earned the right to show her patent claim is infringed. The petition asks this Court to enforce the law, and thus, allow Ms. Hemphill her opportunity that is full and equal under the law. More importantly, the petition asks this Court to defend the Constitution and protect an individual's right 'to particularly point to and distinctly claim her covered invention' under the patent law 35 U.S.C. §112, ¶2. To do anything less is unconstitutional. See the United States Code under 42 U.S.C. § 1981(a):

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts [patents], to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by [the corporations in this case]...". SEE 40A.

Final judgement was the lower court's last opportunity to apply the law. Throughout this entire case, the lower court fails to provide a statutory interpretation for the appellate court to review. This creates problems for the appellate courts. In the ninth circuit, "[t]he majority recognizes, the appellate review must "be particularly careful to take a "hard look" at the district court's conclusions." Techsearch, LLC. v. Intel Corp. 286 F.3d. 1360 (Fed. Cir. 2002). 1381. The appellate courts must be mindful that the patent is a grant of jurisdiction **to enforce the guarantees recognized and enacted by Congress.** Otherwise, appellate courts will 'jump to conclusions' in a 'rush to judgement' as if "the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *citing* Joshua v. United States, 17 F. 3rd. 378, 380 (Fed. Cir. 1994). See Appendix at 3A. Therefore, federal circuit judges Bryson, Gjarsa and Prost summarily affirmed the lower court's decision **in direct conflict with the Supreme Court's decision** in Warner-Jenkinson Co. v. Hilton Davis Chemical Co. 520 US 17, 18 (1997):

> "Title 35 U.S.C. §112,¶ 2 is the **requirement for a patentee [Ms. Hemphill] to specifically "claim" the covered invention**".

It is wholly improper and clearly erroneous to dismiss a statutory interpretation that is **mandatory,** and thereby, violate the right to particularly point to and distinctly claim *"What I claimed"* in Col 6, ll. 59 through Col. 7 ll.5 in the independent claim 1 in the '720 Patent. The law is not vague. Based on the lower court's legal standard for Ms. Hemphill to prove a claim of literal

infringement, this Court must defend Ms. Hemphill's first amendment right to show her claims are infringed. Jurisprudence in the Supreme Court agrees that Ms. Hemphill, being the applicant, is the person, worthy to point out and distinctly claim her invention because the statute under Title 35 U.S.C. §112, ¶2 compels her to do so.

Unless the appellate court willfully intends to *subvert the balances* in the PTO, disregard laws passed by Congress in an effort to defy the Constitution of the United States, judges must agree to review prior art structure disclosed in the Hemphill '720 patent itself. The instruction given by the Supreme Court made it copiously clear that

> "the Federal Circuit should **be extremely reluctant to upset the basic assumptions of the PTO and without substantial reason for doing so."** in Warner-Jenkinson Co. v. Hilton Davis Chemical Co. 520 US 17 (1997) 32.

The Supreme Court fully accepts congressional judgement to reward inventors through the Patent System. Expressly sanctioned by the Constitution of the United States of America, Article I, Section 8, cl. 8, represents an affirmative policy choice by Congress to reward inventors." Blonder-Tongue v. University Foundation 402 U.S. 313, 330-331. (1970) Congress and the Supreme Court made provisions for applicants in patent cases. Regardless to whether the applicant is a corporation or an individual, the applicant is entitled to 'fairness' under the law:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to

> make and enforce contracts [patents], to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by [the corporations]..." See 42 U.S.C. 1981(a).

Plaintiff Hemphill suffers injury in fact by being forced into the dilemma of forgoing PTO directives that clearly affect the Patent System. These injuries would be redressed by a favorable decision to apply the law. Ms. Hemphill met the criteria for standing set forth in 35 U.S.C. §112, ¶2, as well as, Title 42 U.S.C. § 1981(a). In this case, two issues arise in this case which this Court should clarify and enforce.

A) Clarify the statute is relevant law in patent cases. Resolution of this issue is an important federal question.

B) Protect the right 'to petition the court for a redress of grievances' which thereby, *enforces the statute* 35 U.S.C. §112, ¶2.

Unless this Court conducts a judicial determination that the statute is not relevant, the lower courts *must enforce the law.* The statute is crystal clear. Every attempt to reconcile the lower court decision with other circuit decisions has been to no avail. Until a court successfully invalidates the law without question, as they are trying to do in this case, the Court that is called Supreme must enforce the rule of law. Preserving the statute consistent with the constitutional right to petition the court <u>is,</u> to comply with the United States Patent Laws passed by Congress under Title 35 U.S.C.§ 112, paragraph 2. Non-compliance in the lower court *is telling you,* in this Court, *you must enforce the law* to ensure the rights of an individual applicant will be preserved.

The lower courts are suggesting that the enacted law will not be enforced because Ms. Hemphill does not lack remedy. Should this Court that is called Supreme signify it cannot accept this case for review and/or atonement, thereby not expressing the Court's view on the merits of the case, Congress has the final word in patent cases. It seems clear that Ms. Hemphill did the only thing that responsible inventors/patent owners could have done which is to seek a judicial resolution first, opening the door to congressional judgement. The public has a vital interest in the enforcement of the challenged federal law.

Both the district courts and federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress. Quakenbush v. Allstate Insurance Co., 517 US 706, 716 (1996). Rather than enforce the law, the lower courts are finding the mandatory law as unconstitutional. The lower courts are forcing a patent owner to violate the statute to test its constitutionality and to forego the exercise of claimed rights. America's law-abiding patent owners, being persons or individuals, should have the same access to the courthouse door to have their rights declared as do corporations.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

Allegra D. Hemphill
6217 Charnwood Drive
Rockville, Maryland 20852
(301) 897 - 2030

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PATENT AND TRADEMARK OFFICE
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United States Court of Appeals for the Federal Circuit

2006-1300

Allegra D. Hemphill Plaintiff,
Appellant
v.
The Procter & Gamble Company
and Kimberly-Clark Corporation
Appellee.

ON MOTION

Before BRYSON, GAJARSA and Prost, Circuit Judges. PER CURIAM.

ORDER

Date Entered May 1, 2006

The Procter & Gamble Company (P&G) move to summarily affirm the February 13, 2006 order of the United States District Court for the District of Maryland in district court case no. 2002-3736 or, in the alternative, to dismiss Allegra D. Hemphill's appeal as frivolous. Kimberly-Clark Corporation joins the motion. Hemphill opposes.

In 2002, Hemphill sued P&G and Kimberly-Clark for infringement of the patent. The district court granted summary judgement of non-infringement. Hemphill appealed and this court affirmed the district court's judgement in 2004. The Supreme Court denied Hemphill petition for a writ of mandamus in 2004. In 2005, Hemphill filed a motion for "final judgement" and to amend the judgement in the district court. The district court denied the motions. In this appeal, Hemphill seeks review of the denial of her motion for final judgement.

In its order denying Hemphill's motion for final judgement, the district court stated:

> Plaintiff now requests a "Final Judgement." It appears that Plaintiff believes that this court has not yet ruled on her claims alleging patent infringement. Plaintiff seems to assert that the court's grant of summary judgement for Defendants is in some way separate and aprat from any ruling on her claims, which she contends are still pending. Plaintiff is mistaken. This court's April 15, 2003, Order fully resolved Plaintiff's claims in favor of Defendants. Judgement was entered on behalf of Defendants and against Plaintiff, and the case was closed.

Plaintiff's later motion to amend judgement was denied. Plaintiff's claims have been fully adjudicated in this court. Moreover, Plaintiff's appeal has been heard and decided by the Federal Circuit, which affirmed this court's earlier ruling. Accordingly, there is nothing further for this court to determine with regard to Plaintiff's case. Plaintiff's motion will now be denied.

P&G argue that we should summarily affirm the district court's order. We agree. Summary affirmance of a case "is appropriate, inter alia, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." Joshua v. United States, 17 F. 3rd. 378, 380 (Fed. Cir. 1994). In the present case, it is clear that summary affirmance is warranted. Hemphill argues that the district court did not decide if her patent was infringed. However, we note that the district court granted summary judgement of noninfringement and that we affirmed that determination.

Accordingly,

IT IS ORDER THAT:

(1) The motion for summary affirmance is granted.

(2) The alternative motion to dismiss is denied.

(3) All sides bear their own costs.

FOR THE COURT

May 1, 2006 Jan Horably Clerk

Filed US Court of Appeals for the Federal Circuit May 1, 2006

Issues as a mandate May 22, 2006

United States Court of Appeals for the Federal Circuit

2006-1300

Allegra D. Hemphill Plaintiff,
Appellant
v.
The Procter & Gamble Company
and Kimberly-Clark Corporation
Appellee.

ON MOTION

Before BRYSON, GAJARSA and Prost, Circuit Judges.
PER CURIAM.
ORDER
Date Entered June 27, 2006

Upon consideration of Allegra D. Hemphill's motion for reconsideration of the court's May 1, 2006 order summarily affirming the February 13, 2006 order of the United States District Court for the District of Maryland that denied her motions for final judgement and to amend the judgement,

IT IS ORDERED THAT:

The motion for reconsideration is denied.

FOR THE COURT

Jan Horably Clerk

Filed US Court of Appeals for the Federal Circuit Jun 27, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLEGRA D. HEMPHILL

v. Civil Action No. DKC 2002-3726
(Exempt from ECF)

PROCTER & GAMBLE CO., et al.

ORDER

Date Entered: February 13, 2006

For the reasons stated in the foregoing Memorandum Opinion, it is this 13th days of February, 2006, by the United States District Court for the District of Maryland, ORDERED that:

1. The motion of Plaintiff Allegra D. Hemphill for a Final Judgement (paper 46) BE, and the same IS, DENIED; and
2. The Clerk will transmit copies of the Memorandum Opinion and this Order to plaintiff and counsel for the defendants.

/s/Deborah K. Chasanow
United States District Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT MARYLAND

ALLEGRA D. HEMPHILL

v. Civil Action No. DKC 2002-3726
(Exempt from ECF)

PROCTER & GAMBLE CO., et al.

MEMORANDUM OPINION
Date Entered: February 13, 2006

Presently pending and ready for resolution in this case is the unopposed motion by Plaintiff Allegra D. Hemphill for a "final judgement." Paper 46. The issue has been briefed by Plaintiff and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the reasons that follow, the court will deny the motion.

On April 15, 2003, this court granted the motions of Defendants Kimberly-Clark Corp. and Procter & Gamble Co., for summary judgement. (Paper 36). In the April 15, 2003, Order, the court specifically stated: "Judgement BE, and the same hereby IS, ENTERED in favor of Defendants Kimberly - Clark Corporation and The Procter & Gamble Co., and against Plaintiff Allegra D. Hemphill." The court also ordered the Clerk to transmit copies of the Order and the Memorandum Opinion (paper 35) to Plaintiff and counsel for Defendants, and to close the case. On April 21, Plaintiff filed a motion pursuant to Fed. R. Civ. P. 59 to alter or amend the court's judgement. (Paper 37). The court denied Plaintiff's motion on June 11, 2003. On June 16, 2003, Plaintiff filed a Notice of Appeal to the United States Court of Appeals for the Federal Circuit. In an Order dated January 15, 2004, the Federal Circuit affirmed this court's grant of summary judgement of non-infringement to Defendants. Plaintiff now requests a "Final Judgement." It appears that Plaintiff believes that this court has not yet ruled on her claims alleging patent infringement. Plaintiff seems to assert that the court's grant of summary judgement for Defendants is in some way separate and apart from any ruling on her claims and case for patent infringement, which she contends are still

pending. Plaintiff is mistaken. This court's April 15, 2003, Order fully resolved Plaintiff's claims in favor of Defendants. Judgement was entered on behalf of Defendants and against Plaintiff, and the case was closed. Plaintiff's later motion to amend the court's judgement was denied. Plaintiff's claims have been fully adjudicated in this court. Moreover, Plaintiff's appeal has been heard and decided by the Federal Circuit, which affirmed this court's earlier ruling. Accordingly, there is nothing further for this court to determine with regard to Plaintiff's case. Plaintiff's motion will be denied. A separate Order will follow.

/s/Deborah K. Chasanow
United States District Court Judge

United States Court of Appeals for the Federal Circuit

03-1463

ALLEGRA D. HEMPHILL,

Appellant,

v.

PROCTER & GAMBLE CO.,

Appellee,

v.

KIMBERLY-CLARK CORPORATION

Appellee.

COMBINED PANEL REHEARING AND REHEARING EN BANC DENIED

Dated: February 23, 2004

Before RADER, BRYSON, and GAJARSA, Circuit Judges.

RADER, Circuit Judge.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED, that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on March 1, 2004.

Circuit Judge Schall did not participate in the vote.

FOR THE COURT,

/s/_____

Jan Horbaly, Clerk

Dated: February 23, 2004

cc. Allegra D. Hemphill

Kenneth R. Adamo, V. Bryan Medlock Jr.

Filed U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT FEB. 23, 2004

HEMPHILL V. PROCTER & Gamble, 03-1463

(DCT -02-CV-3736)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

03-1463

ALLEGRA D. HEMPHILL,

Appellant,

v.

PROCTER & GAMBLE CO.,

Appellee,

v.

KIMBERLY-CLARK CORPORATION

Appellee.

RADER, BRYSON, and GAJARSA, Circuit Judges. RADER, Circuit Judge.

DECIDED: JANUARY 15, 2004

JUDGEMENT ENTERED JANUARY 15, 2004

United States Court of Appeals for the Federal Circuit

03-1463

ALLEGRA D. HEMPHILL,

Appellant,

v.

PROCTER & GAMBLE CO.,

Appellee,

v.

KIMBERLY-CLARK CORPORATION

Appellee.

JUDGEMENT

ON APPEAL from the United States District Court for the District of Maryland

IN CASE NO(S): 2002-3736

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

Jan15, 2004 /s/

/ksb

DATE Jan Horbaly, Clerk

ISSUED AS A MANDATE: MARCH 1, 2004

NOTE: Pursuant to Fed. Cir. 47.6, this disposition is not citable as precedent. It is public record.

United States Court of Appeals for the Federal Circuit

03-1463

ALLEGRA D. HEMPHILL,

Appellant,

v.

PROCTER & GAMBLE CO.,

Appellee,

v.

KIMBERLY-CLARK CORPORATION

Appellee.

DECIDED: January 15, 2004

Before RADER, BRYSON, and GAJARSA, Circuit Judges. RADER, Circuit Judge.

The United States District Court for the District of Maryland granted summary judgement of noninfrignement in favor of defendants-appellees Kimberly-Clark Corporation and The Procter & Gamble Company (appellees). The district court held that defendants' products do not infringe claim 1 of U.S. Patent No. 4,557,720 (The '720 patent) owned by pro se plaintiff-appellant Allegra Hemphill. Because the district court properly granted summary judgement, this court affirms.

BACKGROUND

In a previous action, appellant sued McNeil-PPC, Inc. alleging infringement of claim 2 of the '720 patent. The '720 patent claims a disposable vaginal swab or refresher used to cleanse or treat the vaginal area. The district court in that case construed various claim terms in claim 2 and granted summary judgement of noninfrignement in favor of McNeil-PPC. See Hemphill v. McNeil-PPC, Inc., 134 F. Supp. 2d. 719 (D. Md. 2001). This court affirmed that judgement in an unpublished decision dated November 27, 2001. See Hemphill v. McNeil-PPC, Inc., 25 Fed. Appx. 915 (Fed. Cir. 2001).

Appellant filed this action in late 2002 asserting claim 1 of the '720 patent. Claim 1 contains many of the same claim terms that this court construed in the previous action with respect to claim 2. The district court applied the doctrine of collateral estoppel to hold that the interpretation of claim terms in claim 2 in the prior action applies to those same terms in claim 1 in this action. The district court found no material factual dispute concerning the accused products and held, as a matter of law, that appellees' products do not infringe claim 1 under the required claim construction.

DISCUSSION

This court reviews a district's grant of summary judgement without deference. Because the application of general collateral estoppel principles is not a matter within the exclusive jurisdiction of this court, this court must apply the law of the circuit in which the district court sits. Pharmacia & Upjohn Co. V. Mylan Pharms. Inc., 170 F3d. 1373, 1381 n.4

(Fed. Cir. 1999). Under the law of the Fourth Circuit, the application of collateral estoppel is a legal determination reviewed de novo. See Tutlle v. Arlington County School Bd., 195 F3d. 698, 703 (4th Cir. 1999). Collateral estoppel applies where:

(1) the issue sought to be precluded is identical to one previously litigated; (2) the issue [was] actually determined in the prior proceeding; (3) determination of the issue was a critical and necessary part of the decision in the prior proceeding; (4) the prior judgement [is] be final and valid; and (5) the party against whom estoppel is asserted...had a full and fair opportunity to litigate the issue in the previous forum." Sedlack v. Braswell Servs. Group Inc., 134 F. 3d. 219, 224 (4th Cir. 1998).

Appellant's appeal focuses solely on claim construction. Appellant seems to argue that the district court should have performed a de novo evaluation of the terms in claim 1 using intrinsic evidence from the patent rather than adopting portions of the claim construction of claim 2 from the previous litigation. To the contrary, the meaning of several claim terms in this litigation is identical to the meaning accorded those same terms in the earlier case. The earlier case litigated and decided the meaning of those terms in claim 1. Thus, the appellant has already received a full and fair opportunity to prove the meaning of those contested terms. The district court in this case correctly determined that the claim construction from the earlier case governs many of the terms in this case as well. Appellant has not indicated any flaw in the district court's collateral estoppel analysis. The record shows that the district court's

determination of the meaning of identical terms in the earlier case was essential to the judgement in that case. As noted, the parties had a full and fair opportunity to litigate the issues. Therefore, the district court in this case properly estopped the appellant from retrying those issues.

The district court correctly recognized that identical claim terms cannot be given a different meaning in different claims of the same patent unless the patent clearly provides otherwise. See Georgia-pacific Corp. v. United States Gypsum Co., 195 F3d. 1322, 1331 (Fed. Cir. 1999). Because the claim construction of claim 2 in the prior action satisfies the principles of collateral estoppel, it is applicable in this action. See Pfaff v. Wells Elecs., Inc., 5 F.3d. 514 (Fed. Cir. 1993). Consequently, claim terms in claim1 identical to terms defined in the previous action must carry that same meaning.

Appellant does not argue that the district court erred in applying the properly construed claims to the accused products. Appellant's arguments merely express disagreement with the interpretation of the claim terms in dispute. Again, those issues have been fully litigated, decided by the district court, and affirmed by this court. Therefore, this record presents no reason for this court to depart from the earlier claim construction. This court perceives no error in the district court's summary judgement of noninfrignement. That judgement is, therefore, affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT MARYLAND

ALLEGRA D. HEMPHILL

v. Civil Action No. DKC 2002-3726
(Exempt from ECF)

PROCTER & GAMBLE CO., et al.

REHEARING DENIED

ORDER and MEMORANDUM OPINION

Date Entered: JUNE 11, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT MARYLAND

ALLEGRA D. HEMPHILL

v. Civil Action No. DKC 2002-3726
(Exempt from ECF)

PROCTER & GAMBLE CO., et al.

ORDER

For the reasons stated in the foregoing Memorandum Opinion , it is this 11th day of June 2003, by the United States District Court for the District of Maryland, ORDERED that:

1. Plaintiff's motion to alter or amend judgement pursuant to Fed. R. Civ. P. 59(e) BE, and the same hereby IS, DENIED; and

2. The Clerk shall transmit copies of the Memorandum Opinion and this Order to Plaintiff and counsel for Defendants.

/s/_____
Deborah K. Chasanow
United States District Judge

MEMORANDUM OPINION

Presently pending and ready for resolution is Plaintiff Allegra D. Hemphill's motion, pursuant to Fed. R. Civ. P. 59(e), to alter or amend the court April 15, 2003 order granting Defendants' motions for summary judgement of noninfringement. The issues have been fully briefed and no hearing is deemed necessary. Local Rule 105.6. For reasons that follow, the court shall deny the motion.

I. Standard of review

"A motion for reconsideration [pursuant to Fed. R. Civ. P. 59(e) is granted only in limited circumstances." *Micorbix Biosystems, Inc. v. Biowhittaker, Inc.*, 184 F. Supp. 2d. 434, 436 (D.Md. 2000) . "[T]he federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits." *White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445, 451 (1982). It may be made for one of three reasons:

(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not [previously] available...; or (3) to correct a clear error of law or prevent manifest injustice. *Hill v. Braxton*, 277 F3d. 701, 708 (4th Cir. 2002). "[A] motion to reconsider is not a license to reargue the merits or present new evidence." *Royal Insurance Co. of America v. Miles & Stockbridge, P.C.* 142 F.Supp. 2d. 676, 677 n. 1 (D. Md. 2001), *citing RGI, Inc. v. Unified Indus., Inc.* 963 F2d. 658 (4th ir. 1992).

II. Analysis

Plaintiff's motion does not satisfy any of the three potential grounds for reconsideration under Rule 59(e). She has presented neither new evidence nor intervening changes in controlling law, nor has she established that the court's decision was clearly erroneous or resulted in manifest injustice. Rather, she proffers the same arguments regarding claim construction previously submitted in her opposition to Defendant's motions for summary judgement, which the court has already rejected. Thus, Plaintiff is attempting simply to reargue the merits of the case, which is not permissible under Rule 59(e) motion to alter or amend a judgement. Plaintiff's suggestion that the court erred in not allowing claim construction to be decided by a jury is without merit, as it is well-settled that claim construction is a matter of law for the court to decide. See *Markman v. Westiview Instruments, Inc.*, 52 F3d. 967,979 (Fed. Cir. 1995)(en banc), aff'd, 517 U.S. 370 (1996).

III. Conclusion

For the foregoing reasons, the court will deny Plaintiff Allegra D. Hemphill's motion to alter or amend judgement. A separate Order will be entered.

/s/ Deborah K. Chasanow
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT MARYLAND

ALLEGRA D. HEMPHILL

v. Civil Action No. DKC 2002-3726
(Exempt from ECF)

PROCTER & GAMBLE CO., et al.

ORDER and MEMORANDUM OPINION

ENTERED: April 15, 2003

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLEGRA D. HEMPHILL

v. Civil Action No. DKC 2002-3726
(Exempt from ECF)

PROCTER & GAMBLE CO., et al.

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 15th day of April, 2003, by the United States District Court for the District of Maryland, ORDERED that:

1. Defendant's Motions for Summary Judgement BE, and the same hereby ARE, GRANTED;

2. JUDGEMENT BE, and the same hereby IS, ENTERED in favor of Defendants Kimberly-Clark Corporation and The Procter & Gamble Co., and against Plaintiff Allegra D. Hemphill;

3. Defendants' counterclaims for declaratory judgements of noninfrignement BE, and the same hereby ARE, DISMISSED without prejudice; and

4. The Clerk shall transmit copies of the Memorandum Opinion and ~~this Order~~ to Plaintiff and Counsel for Defendants and CLOSE this case.

/s/_____
DEBORAH K. CHASANOW
United States District Judge

C/M 4/15/03

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT MARYLAND

ALLEGRA D. HEMPHILL

v. Civil Action No. DKC 2002-3726
(Exempt from ECF)

PROCTER & GAMBLE CO., et al.

MEMORANDUM OPINION

Presently pending and ready for resolution are the motions for summary judgment of noninfrignement filed by Defendants Kimberly-Clark Corporation ("Kimberly-Clark") and The Protect & Gamble Co. ("Procter & Gamble"), as well as Defendants' counterclaims for declaratory judgements of noninfrignement. The issues have been fully briefed and no hearing is deemed necessary. Local Rule 105.6. For reasons, that follow, the court shall grant Defendants' motions for summary judgement and dismiss the counterclaims without prejudice.

I. Background

A. Procedural History

This is the second lawsuit brought in this court by Plaintiff Allegra D. Hemphill against manufacturers of personal care products for alleged infringement of her US Patent No. 4,557,720 (the '720 patent"). In the first lawsuit, Hemphill v. McNeil-PPC, Inc., Civ. A. No. DKC 99-654 ("Hemphill I"), Plaintiff alleged that the defendants STAYFREE and CAREFREE feminine sanitary napkins and SERENITY adult napkins products infringed claim 2 of her '720 patent. In that case, after ruling on the meaning of the claim terms and

concluding that the accused products do not infringe claim 2 of the '720 patent, the court granted the defendant's motion for summary judgement. See Hemphill v. McNeil-PPC, Inc., 134 F. Supp. 2d. 719 (D. Md. 2001). The Court of Appeals for the Federal Circuit affirmed the decision on November 27, 2001 in an unpublished opinion. 25 Fed. Appx. 915 (Fed. Cir. 2001).

In November 2002, Plaintiff filed the current action alleging infringement by Kimberly-Clark's KOTEX and POISE product lines and Procter & Gamble's ALWAYS and TAMPAX products lines ("the accused products")[1]. Products bearing the KOTEX and ALWAYS brand names are feminine sanitary napkins. Products bearing the KOTEX SECURITY and TAMPAX brand names are tampons, and those bearing the POISE brand names are adult napkins.[2] Defendants Kimberly-

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[1]Although TAMPAX expressly mentioned in the complaint, Plaintiff's opposition suggests that she regards TAMPAX as an accused product, and Procter & Gamble has included the product in its summary judgement motion. See Paper no. 32,at 29; Ex. C3. Accordingly, the court will include TAMPAX in this opinion. The judgement motion with respect to the ALLDAYS pantiliner product and the ENVIVE miniform product which are not mentioned anywhere by the Plaintiff, but are included by the Defendant "for the sake of the completeness." The opinion will be limited to the allegedly infringing products actually before the court.

[2]Plaintiff's complaint accuses Kimberly-Clark's KOTEX of infringement, but does make clear whether she is referring to KOTEX sanitary napkins, KOTEX SECURITY tampons, or both. Her opposition, while not a model of clarity, suggests that she is accusing both types of products. The court's infringement analysis will therefore will include both KOTEX sanitary

Clark and Procter & Gamble filed separate motions for summary judgement of noninfrignement with regard to their accused products. Each Defendant has asserted a counterclaim for a declaratory judgement of noninfringement , but has said that it would consent to dismissal without prejudice of the counterclaim if its motion for summary judgement is granted.

B. Background of the '720 Patent

Plaintiff filed her application for the '720 patent with the Patent and Trademark Office ("PTO") on June 11, 1984, and her patent was subsequently issued on December 10, 1985. See paper no. 1, Ex. A. Bearing the title "Vaginal Applicator", the '720 patent describes a disposable vaginal swab or refresher meant either to cleanse or treat the vaginal area with fragrances, medications, germicide or deodorants. Id., Ex. A. Col. 1, lines 33-38. The '720 Patent has two independent claims, but only claim 1 is at issue in this litigation. The description contained in claim 1 of the Applicator is as follows:

1. A vaginal swab comprised of an outer housing having a closed and open end on opposing ends thereof, said housing including an annular band defining said open end and a plurality of frangible seams that together define a pair of removable members and a pair of housing segments hingably secured to said annular band following removal of said members, a swab core member having a predetermined exterior shape, said core member having an annular base with an outer diameter equal to the inner diameter of said annular band and an adsorbent

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napkins and KOTEX SECURITY tampons.

member secured to said core member, said core member being secured within said housing so that said adsorbent member is enclosed therein.

Id., Ex. A. Col. 6, line 1- Col. 7, line 5.

Claim 2, which was the claim at issue in Hemphill I, provides as follows:

2. A vaginal swab comprising an outer housing including an inner case member and an outer case member at least part of which is connected to and said overlies inner case member; a core member, at least one layer of porous material secured to said core member, and housing means for both supporting and enclosing said core member, said core member being secured to said housing means, having at least two portions movable relative to one another between first and second positions for enclosing said core member when in said first position and for both, exposing said core member and the said porous padding secured thereto and for forming a handle for said swab when in said second position. Id., Ex. A, Col. 7, line 6 -Col. 8, line 10.

In addition to claiming a "vaginal swab", both claims require the "outer housing" and "core member" that were construed by the court in Hemphill I. [3]

C. Accused Products

KOTEX sanitary napkins, ALWAYS sanitary napkins and POISE adult napkins are sold in bags or boxes containing multiple napkins, which are individually wrapped in plastic. See

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[3]For a description of the prosecution history of the '720 patent and the reexamination proceedings, see Hemphill I, 134 F. Supp. 2d. At 721-23.

Declaration of Herbert E. Grube, Paper no. 22, Ex. A1. ¶ 5 ("Grube Decl."); Declaration of Mary Jo Myer, Paper no. 22 Ex. A2, ¶ 5 ("Meyer Decl."); Declaration of Thomas W. Osborn III, paper no. 23, Ex. 2,
¶ 4 ("Osborn Decl."). The sanitary napkins are composed of an absorbent core material placed between a flexible liquid pervious topsheet and a liquid-impervious plastic backsheet that has an adhesive on the outside for attaching the napkin to an undergarment. See Grube Decl. ¶ 6; Meyer Decl. ¶ 6; Osborn Decl. ¶ ¶ 4-5. The side of the plastic backsheet containing the adhesive has a thin paper sheet to it to protect the adhesive. See Grube Decl ¶ 6; Meyer Decl.¶ 7; Osborn Decl.¶ 5.

In order to use the sanitary napkins, the consumer removes the plastic wrapper from the product, peels off the thin paper sheet, and affixes the adhesive side to the undergarment. See Grube Decl. ¶7; Meyer Decl.¶ 8; Osborn Decl. ¶¶ 6-7. The napkins are intended to passively collect fluid during use. See Grube Decl. ¶9; Meyer Decl. ¶ 10; Osborn Decl. ¶ 7. The napkins are not designed to be used or placed internally into the vagina. See Grube Decl.¶ 11; Meyer Decl. ¶ 12; Osborn Decl. ¶ 9. After use, the consumer removes the napkin from the undergarment and discards it, either directly or by first wrapping it in the plastic wrapper of the next napkin.. See Grube Decl.¶ 8; Meyer Decl. ¶ 9; Osborn Decl.¶ 8.

KOTEX SECURITY tampons and TAMPAX tampons are also generally sold in bags or boxes containing multiple individually-wrapped tampons. See Grube Decl.¶ 16; Osborn Decl. ¶21. Each tampons is composed of a piece of absorbent

material made from cotton and or rayon surrounded by a liquid pervious overwrap. A string is attached to the bottom of the absorbent piece, which is compressed into a plastic applicator. See Grube Decl. ¶17; Osborn Decl. ¶ 20. To use the tampon the customer removes the plastic wrapper, inserts the applicator into the vagina and expels the tampon from the applicator into the vagina by pressing the inner tube up into the outer tube. See Grube Decl. ¶ ¶18-19; Osborn Decl. ¶ 23. The applicator is then removed, leaving the tampon in the vagina to passively collect fluid. See Grube Decl. ¶19; Osborn Decl. ¶ 23. After use, the consumer removes the tampon by pulling on the string and then discard it either directly or by wrapping the used tampon in the plastic wrapper of the next tampon. See Grube Decl. ¶10; Osborn Decl.¶ 23.

II. Standard of Review

In patent cases, as well as in other cases, a motion for summary judgement will be granted only if there exists no genuine issues as to any material fact and the moving party is entitled to judgement as a matter of law. Fed. R. Civ. P. 56(c); *Anderson V. Liberty Lobby Inc.*, 477 U.S. 242, 250 (1986): *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986): *Clark v. Alexander*, 85 F3d. 146, 150 (4th Cir. 1996). The moving party bears the burden of showing that there is no genuine issue of material fact. Fed. R. Civ. P 56(c): *Pulliam* 810 F2d. 1286 (*citing Charbonnages de France v. Smith*, 597 F2d. 406, 414 (4th Cir. 1979).

When ruling on a motion for summary judgement the court must draw all reasonable inferences in favor of and

construe the facts in the light most favorable to the non-moving party. *Tinsley v. First Union Nat'l Bank*, 155 F3d. 435, 437 (4th Cir. 1998). A properly supported motion for summary judgement may not be defeated by "the mere existence of some alleged factual dispute between the parties". *Anderson* , 477 U.S. at 247-48. Further, while the court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case, the requirement of liberal construction does not mean that the court can assume the existence of a genuine issue of material fact where none exists. *Weller v. Dept. of Social Services*, 901 F. 2d. 387, 391 (4th Cir. 1990); *Beaudett v. City of Hampton*, 775, 775 F2d. 1274, 1277 (4th Cir. 1985).

Although an infringement analysis usually involves both fact and law, summary judgement of noninfrignement may still be proper. *Nike, Inc. v. Wolverine Worldwide, Inc.*, 43 F3d. 644, 646 (Fed. Cir. 1994); *Chemical Eng'g Corp. v. Essef Indus. Inc.*, 795 F2d. 1565, 1571 (Fed. Cir. 1986). A good faith dispute about the meanings and scope of asserted claims does not, in and of itself, create a genuine dispute to preclude summary judgement in patent cases. *Lantech Inc. v. Keip Mach. Co.*, 32 F.3d. 542, 546 (Fed. Cir. 1994).

III. Analysis

Plaintiff alleges that the accused products infringe on claim 1 of the '720 patent. In order to assess Defendants' motions for summary judgement of noninfrignement, the court must engage in a two-step infringement analysis. "The first step is determining the meaning and the scope of the patent claim

asserted to be infringed. The second step is comparing the properly construed claims to the device accused of infringing. *Markman v. Westview Instruments, Inc.* 52 F.3d. 867, 979 (Fed. Cir. 1995); *en banc, aff'd* 517 U.S. 370 (1996). Claim construction is correctly a matter of law for the court to decide. Id. When construing a claim a court should look to the intrinsic evidence, i.e., the patent itself, its claims, written description, and the prosecution history. See *Vitronics Corp. v. Conceptronic, Inc.* 90 F3d. 1576, 1582 (Fed. Cir. 1996). Additionally, statements made during the reissue [reexamination] proceeding "are relevant prosecution history when interpreting claims." *E. I. Du Pont de Nemours & Co. v. Phillip Petroleum Co.*, 849 F2d. 1430, 1439 (Fed. Cir. 1988). Prosecution history need not relate to the particular claim at issue in a claim in order to be relevant, so long as the prosecution history in question relates to the same claim term as in the asserted claims. See *Alpex Computer Corp. v. Nintendo Co.*, 102 F.3d. 1214, 1220 (Fed. Cir. 1996).

A. Claim Construction

In Hemphill I, the court construed the terms "vaginal swab". "outer housing", and "core member," and the Federal Circuit affirmed these constructions. Defendants argue that under the doctrine of collateral estoppel, or issue preclusion, the meaning of these terms as construed by the court in Hemphill I must apply in the instant case as well. There are four factors that must be met for collateral estoppel to apply: (1) the issue was identical to one decided in an earlier action; (2) the issue was actually litigated in earlier action;

(3) resolution of the issue was essential to a final judgement on the merits and (4) the plaintiff had a full and fair opportunity to litigate the issue in the earlier action. See *Molinaro v. Fannon/Courier Corp.*, 745 F.2d. 651, 655 (Fed. Cir. 1984); *A.B. Dick Co. v. Burroughs Corp.*, 713 F.2d. 700, 704-704, (Fed. Cir. 1983). The Federal Circuit has held that collateral estoppel applies to issues of claim construction. Specifically, "'where a determination of the scope of the patent claims was made in a prior case, and the determination was essential to the judgement thereon the issue of infringement there is collateral estoppel in a later case on the scope on such claims.'" *Pfaff v. Wells Electronics, Inc.*, 5 F3d. 514, (Fed Cir. 1993), *quoting Molinaro*, 745 F2d. At 655.

Plaintiff's opposition appears to focus solely on the first required factor for collateral estoppel. Plaintiff argues that collateral estoppel to claim construction in this suit because the first suit pertained to alleged infringement of claim 2, while this suit concerns claim 1. However, the claim terms construed in Hemphill I, appear in both claims 1 and claim 2. It is well-settled law that unless the patent provides otherwise, a claim term cannot be given a different meaning in various claims of the same patent. See *Georgia-Pacific Corp. v. United States Gypsum Co.*, 195 F.3d. 1322, 1331 (Fed., Cir 1999); *Southwall Tech., Inc. v. Cardinal IG Co.*, 54 F.3d. 1570, 1579 (Fed. Cir. 1995). Plaintiff has not demonstrated that anything in the patent requires that terms be given a different construction in claim 1 than in claim 2. Thus, the issue in this suit, i.e., the meaning of "vaginal swab", "outer housing", and "core member," is the

same issue already decided in Hemphill I. Plaintiff's attempt to describe claim 1 as "structural" in order to distinguish it from claim 2 is unpersuasive, in part because claim 2 is also a structural claim (as opposed to a process or method claim).

Because the requirements for collateral estoppel have been met, the claim construction established in Hemphill I, must be given collateral estoppel effect on claim construction in this case. Accordingly, Plaintiff is collaterally estopped from arguing, as she tries to do in her opposition motion, for a new construction of the claim terms "vaginal swab", "outer housing" and "core member".

In Hemphill I, the court construed "vaginal swab" as "a small piece of absorbent material attached to the end of a stick or wire and used for cleansing or applying medicine," meant to be used within the vaginal canal. [4] See Hemphill I, 134 F. Supp 2d. At 726-27, *citing American Heritage Dictionary* 1810 (3d ed. 1992); see also *Dorland's Medical Dictionary* 1617 (28th ed. 1994). The court construed the term "outer housing" as a device that serves as a handle structure for the use of the swab and is not designed to be removed and thrown away. Id. At 727. "Core member" was construed by the court as "a fairly rigid core member with an annular band or ring at its base that can fit into the band or ring of the outer housing," Id. These are the definitions against which the accused

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[4]The court expressly rejected the argument that Plaintiff again tries to make in this case that "vaginal" refers to the outer housing as the cover or sheath. 134 F.Supp 2d. At 726.

products must be compared to determine whether they infringe on claim 1 of the '720 patent.

B. Comparison to Accused Products

1. Literal Infringement

A claim of literal infringement requires proof that the accused devices meet every limitation of the properly construed claims. See *Gentry Gallery, Inc. v. Berkline Corp.*, 134 F. 3d. 1473, 1476 (Fed. Cir. 1998). "If even one limitation is missing or not met as claimed, there is no literal infringement." *Mas-Hamilton Group v. LaGard Inc.*, 156 F.3d. 1206, 1211 (Fed. Cir. 1998). Defendants argue that because their products lack several limitations of claim 1, there can be no literal infringement as a matter of law.

a. KOTEX, POISE and ALWAYS sanitary napkins

Like the products in Hemphill I, the accused sanitary napkins in the current case do not function as "vaginal swab" as required by the claims in the '720 patent. Plaintiff herself has stated that her vaginal swab does not resemble, behave , or function like a sanitary napkin. See Paper 22, Ex. D1 at PTO 00440. As discussed earlier, the sanitary napkins are intended to cover a portion of an undergarment to passively collect fluid. They do not consist of a piece of absorbent material attached to the end of a stick or wire and are not designed for internal vaginal use. Indeed, they are neither the size nor shape that would allow for internal use.

Moreover, the structure of Plaintiff's invention differs greatly from the accused sanitary napkins. The sanitary

napkins do not have an "outer housing" structure that is designed to be utilized as a handle for the use of a swab, as required by the '720 claims. The accused sanitary napkins merely have a plastic outer wrapping that is thrown away once the napkin is utilized. At most, the discarded wrapper covers the used and soon-to be discarded napkin. The plastic wrapping is in no way equivalent to the handle function of the "outer housing" in Plaintiff's invention.

Additionally, the accused sanitary napkins lack a "fairly rigid" core member with an annular band or ring at its base that can fit into the band or ring of the outer housing. While the sanitary napkins do have an absorbent core, the core is soft and pliable, not "fairly rigid", and they do not have an annular band or ring that can fit into the band or ring of an outer housing. Given the absence of the foregoing elements from the accused sanitary napkins, Plaintiff has failed to establish that the accused products literally infringe upon her '720 patent.

B. KOTEX SECURITY and TAMPAX tampons

Similarly, Kimberly-Clark's KOTEX SECURITY tampons and Procter & Gamble's TAMPAX tampons do not literally infringe upon the '720 patent. Although they are intended for internal vaginal use, the accused tampons are not "swabs". They do not consist of a small piece of absorbent material attached to the end of a stick or wire; the string attached to the tampons only allows the user to remove the tampon, not to manipulate it. In addition, the tampons are designed to absorb menses, not to clean or apply medicine.

Furthermore, the accused tampons do not have an "outer housing" structure that is designed to be used as a handle for the swab, as required by the '720 claims. The tampon applicator does not transform into a handle after the tampon is inserted, but is instead designed to be completely removed and thrown away. Finally, the accused tampons lack a core member with an annular band or ring at the base that can fit into the band or ring of an outer housing. Because the accused tampons lack several elements, they too do not literally infringe on claim 1 of the '720 patent.

2. Doctrine of Equivalents

Under the doctrine of equivalents, a product which does not literally infringe upon the express terms of a patent may nonetheless infringe if there is "equivalence" between the elements of the accused products and the claimed elements, of the patent. *Zelinski v. Brunswick Corp.*, 185 F.3d. 1311, 1316 (Fed. Cir. 1996), *citing Warner-Jenkinson, Inc. v. Hilton Davis Chem Co.* 520 U.S. 17, 21 (1997). Infringement occurs under the doctrine of equivalents if the difference between the particular element and the claim limitation are "insubstantial." Id. A test to determine "insubstantiality" is whether "the element performs substantially the same function in substantially the same way to obtain substantially the same result as the claim limitation." Id., at 1316-17, *citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 608 (1950).

Plaintiff has not demonstrated that the differences between the elements in claims 1 or 2 of the '720 patent and

the accused products are insubstantial. Each of the accused products lacks numerous structural limitations of the '720 patent and serves a different function. As mentioned earlier, plaintiff herself noted during prosecution and reexamination proceedings that her invention, a vaginal swab, does not look, behave or function like a sanitary napkin. See e.g., Paper no. 22, Ex. D1 at PTO 0040. Accordingly, the court finds that no reasonable jury could find there to be equivalence between the accused products and Plaintiff's invention.

IV. Conclusion

Because there is no genuine issue of material fact and Defendants are entitled to judgement as a matter of law, the court shall grant Defendants' motions for summary judgement of noninfringement. Defendants' counterclaims for declaratory judgements of noninfringement will be dismissed without prejudice. A separate Order will be entered.

/s/_____

DEBORAH K. CHASANOW

United States District Judge

April 15, 2003

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

ALLEGRA D. HEMPHILL v. PROCTER & GAMBLE COMPANY and KIMBERLY-CLARK CORPORATION

Civil Action No. DKC 2002-3736

Date of Entry February 21, 2003

ORDER

The Court, having reviewed Defendants' Joint Motion to Stay Discovery Pending Resolution of Summary Judgement [of Non-infringement] Motions, ~~and any~~ there being no Opposition thereto, it is this 21st day of February, 2003, ORDERED AND ADJUDGED:

1. Defendants' ~~Joint~~ Motion to Stay Discovery Pending Resolution of Summary Judgement Motions is hereby GRANTED; and

2. The Clerk shall mail copies of the Order to all counsel of record and to the Pro Se Plaintiff.

/s/Deborah K. Chasanow
United States District Judge
District of Maryland, Southern Division

c/m
2/21/03 30cl

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLEGRA D. HEMPHILL v. THE PROCTER & GAMBLE COMPANY, et al.

Civil Action No. DKC 2002-3736

Date of Entry February 12, 2003

ORDER TO SHOW CAUSE

Defendants have filed a Motion to Stay Discovery Pending Resolution of the Summary Judgement [for Non-infringement] Motion. Accordingly, IT IS this 12th day of February, 2003, by the United States District Court for the District of Maryland, ORDERED that:

1. Plaintiff Show Cause by no later than February 19, 2003, why the Motion to Stay should not be granted; and

2. The Clerk will transmit a copy of this Order to plaintiff and counsel for Defendants.

/s/DEBORAH K. CHASANOW
United States District Judge.

C/M
2/12/03mlm

STATUTES:

UNITED STATES CODE

35 U.S.C. §112 Specification:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his [or her] invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his [or her] invention.

An element in a claim for combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof. (R.S. 4888; 35 U.S.C., 1946 ed., 33.).

UNITED STATES CODE

42 U.S.C. §1981 (a)

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

CLAIMS IN PATENT APPLICATION 434,828

1. A disposable vaginal swab comprised of a housing surrounding a swab member comprised of a stiff core member and an absorbent outer covering secured thereto, at least a portion of s aid housing comprising a removable cover to close said housing and protect said swab member within said housing, said core member being movably retained within said housing so as to be moveable between a first retracted position and a second extended position relative to said housing when said cover has been removed and means for moving said core member between said first retracted and said second extended positions.

2. A swab as in claim 1, wherein said adsorbent cover is comprised of a textile gauze-like fabric.

3. A swab as in claim 1, where said moving means includes a rotatable member rotatably secured to said housing and cam means operatively connecting at least a portion of said core member and the interior of said housing together so that said core member will move vertically within said housing as said rotatable member is rotated.

4. A swab as in claim 3, wherein said core means comprises a cam member fixed to the core member and a tube rotatably retained within said housing and about said core member, said tube member including means defining at least one helical slot extending along length thereof with said core member being operatively associated

with said helical slot

~~5.~~ 1. A vaginal swab comprised of an outer housing having a closed and open end on opposing ends thereof, said housing including an annular band defining said open end and a plurality of frangible seams that together define a pair of removable members and a pair of housing segments hingably secured to said annular band following removal of said removable members, a swab core member having a predetermined exterior shape, said core member having an annular base with an outer diameter equal to the inner diameter of said annular band and an adsorbent member secured to said core member, said core member being secured within said housing so that said adsorbent member is enclosed therein.

~~6.~~ 2. A vaginal swab comprising and outer housing including an inner case member and an outer case member at least part of which is connected to and overlies said inner case member;

a core member, at least one layer of a porous material secured to said core member, and housing means for supporting and enclosing said core member, said core member being secured to said housing means, having at least two portions movable relative to one another between first and second positions for enclosing said core member when in said first position and for both exposing said core member and the said porous padding secured thereto and for forming a handle for said swab when in said second position.

LETTER TO

Honorable Commissioner of Patents and Trademarks Washington DC 20231 November 18, 1983

INFORMATION DISCLOSURE STATEMENT

Attached is form PTO-1499 listing additional US Patents to be brought to the Examiner's attention for his review and consideration.

Ray and Mason show retractable lipstick holders, but are similar to Coryell and Davis cited in the specification. Fielding and Johansson show devices through which water is pumped and are used for douching purposes which is different from the concepts of the present invention. Similarly, Bower discloses a disposable douche and a tubular probe. Laker and Schuster et al relate to devices for collecting vaginal specimens for diagnostic testing and Bridle and Schopflin et al show devices for applying medicines. None of these is felt to be more relevant than the references already cited.

Respectfully submitted, Cushman, Darby, Cushman
By. Peter Gowdey Reg, No. 25,872 PWG:lsp 1801 K. Street, NW Washington DC 200006 Tel: 861-3000

PTOL Form 1449
US DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

INFORMATION CITED BY APPLICANT

Atty Docket No. 3801/22914 Serial No. ~~434,828~~ 619,684
Applicant Allegra Hemphill
Filing Date October 18, 1982 Group 335

Document Number	Date	Name	Class	Subclass
2344060	3/14/44	RAY		
3586452	6/22/71	MASON		
3731682	5/8/73	FIELDING		
251502	4/3/79	BRIDLE		
4155991	5/22/79	SCHOPFLIN		
4157709	6/12/79	SCHUSTER		
4159718	7/3/79	BOWER		
4165942	8/28/79	JOHANSSON		
4175439	11/27/79	LAKER		

DATE CONSIDERED

J. YASKO 4-3-84
CHRISTA SCOTT 12-13-84

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS , WASHINGTON DC 20231
Serial Number 06/434,828
Filing Date 10/18/82
First Named Applicant HEMPHILL A.
Attorney Docket Number
Cushman, Darby & Cushman
1801 K. St., N.W. 8th FLR.
Washington, DC 20006
Examiner Yasko, J.
Art Unit 336
Paper Number 4
Date Mailed 02/28/84
This is a communication from the examiner in charge of your application.
A shortened statutory period for response to this action is set to expire 30 days from the date of this letter.
SUMMARY OF ACTION
1. Claims 1-6 are pending in the application.
6. Claims 1-6 are subject to restriction or election requirement.

(1) This application contains claims directed to the following patentably distinct species of the claimed invention: Figs. 1-2a: Figs. 3-4a" Fig. 6: Figs. 8,9 respectively.

Applicant is required under 35 U.S.C. 121 to elect a single species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claim 1 is generic.

Applicant is advised that a response to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a generic claim is allowable or that all claims are generic is considered non-responsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to not more that a reasonable number of species in addition to the elected species, provided that all claims to each additional species are written in dependent form or otherwise all the limitations of an allowed generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP 809.02(a).

J. Yasko :rk /s/ John D. Yasko

703-557-3501 Examiner Art Unit 336

2/23/84

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of
Allegra HEMPHILL
Serial No. 434,828 Group:336
Filed: October 18, 1982 Examiner: Yasko
For: VAGINAL APPLICATOR Paper No. 6.

********** ********** **********

March 26, 1984

Honorable Commissioner of
Patents and Trademarks
Washington, DC 20231

LETTER

Sir:

In response to the Official Action dated February 28, 1984, please consider the following remarks.

REMARKS

In response to the above identified action, the applicant hereby elects the species of Group I, comprised of Figures 1,2 and 2a for purposes of further prosecution and subject to the allowability of one or more generic claims. A review of the claims has been made and the claims 1,2 and 3 read on the elected species.

An early and favorable action is respectfully requested.

Respectfully submitted,

CUSHMAN, DARBY & CUSHMAN

PWG:lsp

1801 K. Street, N.W.

Washington, DC 20231

Tel. 861-3078

By:/s/_____

Peter W. Gowdey

Reg. No. 25,872

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS , WASHINGTON DC 20231
Serial Number 06/434,828
Filing Date 10/18/82
First Named Applicant HEMPHILL A.
Attorney Docket Number
Cushman, Darby & Cushman
1801 K. St., N.W. 8th FLR.
Washington, DC 20006
Examiner Yasko, J.
Art Unit 336
Paper Number 7
Date Mailed 04/12/84

This application has been examined.
Responsive communication filed on 3-28-84.
A shortened statutory period for response to this action is set to expire 3 months from the date of this letter.
THE FOLLOWING ATTACHMENTS ARE PART OF THIS ACTION
1. Notice of References Cited by Examiner, PTO-892.
3. Notice of Art Cited by Applicant, PTO-1449.
SUMMARY OF ACTION
1. Claims 1-6 are pending in this application.
Of the above, **claims 4-6 are withdrawn from consideration.**

4. Claims 1-3 are rejected.

7. This application has been filed with informal drawings which are acceptable for examination purposes until such time as allowable subject matter is indicated.

Serial Number 434.828

Art Unit 336

1. The following is a quotation of 35 U.S.C. 103 which forms the basis for all obviousness rejections set forth in this Office action:

> A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patent ability shall not be negatived by the manner in which the invention was made.

2. Claims 1 and 3 are rejected under 35 U.S.C. 103 as being unpatentable over Kenner in view of Gelardin.

It is considered obvious and well within the skill of the art to provide the device of Kenner, with a removable cover and rotatable moving means as taught by Gelardin if so needed or desired.

3. Claim 2 is rejected under 35 U.S.C. 103 as being unpatentable over Kenner in view of Gelardin as applied to claim 1 above, and further in view of Alvarez.

Obvious selection of one well known absorbent means for another to select fabric as taught by Alvarez, column 4, lines 17-19 producing no new r unobvious results.

Art of interest:

Barlow, Jeffreys, Gashkell, Austrian patent cited to show swabs.

J.D. Yasko /mb
703-557-3501
4/5/84

/s/_____
John D. Yasko, Examiner
Art Unit 336

Allegra D. Hemphill
1507 Linden Street, Apt. #13
Johnson City, Tn. 37601

May 10, 1984

Commissioner of Patent and Trademarks
Washington, DC 20231

Commissioner of Patent and Trademarks:

I would like to amend the patent specification for the applicant, Allegra D. Hemphill of Johnson City, Tennessee.

The specification covers a small entity, Vaginal Applicator, Serial Number 06/434,828, with the filing date of 10/18/82. An alternative drawing has been provided herewith, and is considered to be covered by the generic claim(s) to the original application.

A Revocation of Power of Attorney is also enclosed herewith. Please submit the contents enclosed herewith, to the attention to the United States Patent and Trademark Office Examiner J. Yasko, Art Unit 336.

Sincerely,
Allegra D. Hemphill

RECEIVED
May17, 1984
Group 350

PATENT AND TRADEMARK OFFICE
MAILROOM S. Little
May 14, 1984 5-21-84

Paper No. 8

REVOCATION OF POWER OF ATTORNEY

I, ALLEGRA D. HEMPHILL, formerly of 6217 Charnwood Drive Rockville, Maryland, presently residing at 1507 Linden Street, #13 Johnson City, Tennessee, 37601, having by instrument dated October 15, 1982, appointed Cushman, Darby & Cushman power of attorney for original U.S. Patent applications in the United States Patent & Trademark Office, do hereby and the same is hereby revoked.

It is my intention that any and all correspondence with the U.S. Patent & Trademark Office directly to my Johnson City, Tennessee address.

ALLEGRA D. HEMPHILL

Sworn to and subscribed before me this 9th day of May, 1984.

/S/ NOTARY PUBLIC

My commission expires:
Jan. 27, 1988

PREPARED BY
GUY S. WEEMS, JR.
ATTORNEY AT LAW
P.O. BOX 313
120 S. CHEORKEE
JONESBOROUGH, TN.37659

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS , WASHINGTON DC 20231
Serial Number 06/434,828
Filing Date 10/18/82
First Named Applicant HEMPHILL A.
Attorney Docket Number
Allegra D. Hemphill
1507 Linden Street, #13
Johnson City, Tennessee, 37601
Examiner Yasko, J.
Art Unit 336
Paper Number 10
Date Mailed 05/25/84
This is a communication from the examiner in charge of your application.
COMMISSIONER OF PATENTS AND TRADEMARKS
Responsive to communication filed on This action is made final.
A shortened statutory period for response to this action is set to expire 3 months from the date of this letter.
SUMMARY OF ACTION
1. Claims 1-6 are pending in the **application.**
   Of the above, claims 4-6 are withdrawn from consideration.
4. Claims 1-3 are rejected

Serial Number 434,828
Art Unit 336

1. The amendment filed May 14, 1984 is objected to under 35 U.S.C. 132 because it introduces new matter into the specification. 35 U.S.C. 132 states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows:

additions to specification and proposed new drawing figures.

Applicant is required to cancel the new matter the response to this Office action.

The amendment to claim 2, is not entered since it is directed to a non-elected species. The species of Figures 1,2,3a was elected paper #6.

2. The following is a quotation of 35 U.S.C. 103 which forms the basis for all obviousness rejections set forth in this Office action:

> A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the rt to which said subject matter pertains. Patent ability shall not be negatived by the manner in which the invention was made.

2. Claims 1 and 3 stand rejected under 35 U.S.C. 103 as being unpatentable over Kenner in view of Gelardin. It is considered obvious and will within the skill of the art to provide the device of Kenner with a removable cover and rotatable moving means as taught by Gelardin if so needed or desired.

4. Claim 2 is rejected under 35 U.S.C. 103 as being unpatentable over Kenner in view of Gelardin as applied to claim 1 above, and further in view of Alvarez. Obvious selection of one well known absorbent means for another to select fabric as taught by Alvarez column 4, lines 17-19, producing no new or unobvious results. It is noted that in any future response to the Office action applicant must submit an argument under the heading "Remarks" pointing out disagreement with the Examiner's contentious. Applicant must also discuss the references applied against the claims, explaining how the claims avoid the references or distinguish from them.

5. This action is a final rejection and is intended to close the prosecution of this application. Applicant's response to this action is limited either to an appeal to the Board of Appeals or to an amendment complying with the requirements set forth below.

If applicant should desire to appeal any rejection made by examiner, a Notice of Appeal must be filed within the period for response identifying the rejected claim or claims appealed. The Notice of Appeal must be accompanies by the required appeal fee of $57.50.

If applicant should desire to file an amendment, entry of a proposed amendment after final rejection cannot be made as a matter of right unless it merely cancels claims or complies with a formal requirement made earlier. Amendments touching the merits of the application which otherwise might not be proper may be admitted upon a showing of good and sufficient reasons why they are necessary and why they were not presented earlier.

The filing of an amendment after final rejection, whether or not it is entered, does not stop the running of the statutory period for response to the final rejection unless the examiner holds the claims to be in condition for allowance. Accordingly, if a Notice of Appeal has not been filed properly within the period for response or any extension of the period obtained under either 37 CFR 1.136(a) or (b), the application will become abandoned.

/s/ Johnson D. Yasko
Examiner
Art Unit 336

J. Yasko:dg
703-557-3144
05-24-84

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of
Allegra Hemphill
Serial No. 434,828 Group 336
Filed: October 18, 1982
For: Vaginal Applicator

********** ********* ******* *******

Honorable Commissioner of June 6, 1984
Patents and Trademarks
Washington, D. C. 20231

Sir:

Attached is an application for a File Wrapper PTO-37CFR 1.62, in response to the Examiner's Office Action on 5/25/84.

This submission is to transfer the aforementioned Serial No. 434.828, abandoned of Species #1, Figures 1,2,2a to elect species #4, Figures 8 an 9.

I have included REMARKS, as suggested by the Office Action, to discuss the references cited, applied against the claims; Alvarez, Kenner and Gelardin distinguishing the differences for all obviousness, as well as supplying reasons for the claims that have been modified.

This material concerns the Vaginal Applicator Device

Allegra Hemphill, Inventor
Serial No. 434,828
Filed October 18, 1982

I wish to elect species #4, Figures 8 and 9, as the embodiment to be brought to the Examiner's attention; Examiner Johnson Yasko, Group 336 for his review and consideration.

Enclosed is the $150.00 fee for the File Wrapper process.

Respectively submitted :

By: /s/_____

Allegra Hemphill
ADH:tr
157 Linden Street #13
Johnson City, Tennessee 37601
Rel. (615) 926-7568

PTOL -37 (Rev.8-82) NOTICE OF ALLOWABILITY

1. Claims 1-4 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b) as being drawn to a non-elected species. Election was made without traverse in Paper No. 1 as filed with continuation application papers.

The papers filed with request for File Wrapper Continuation received June 11, 1984 and the election of species #4, Figures 8 and 9 is noted. The claims readable on the elected species are 5 and 6.

2. Accordingly, claims 1-4 have been canceled.

3. At page 1 of the specification, the following has been inserted, –This Application is a continuation of Serial #434,828 filed October 18, 1982 now abandoned–.

/s/_____ /s/_____

C. Scott/mb John D. Yasko
703-557-3125 Examiner
12/18/84 Art Unit 336

UNITED STATES DEPARTMENT OF COMMERCE
Patents and Trademark Office
619, 684
UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS
WASHINGTON, DC 20231
A. Gomillion
12-19-84
EXAMINER ART UNIT PAPER NUMBER
Paper Number 3/.A
DATE MAILED: JAN 7-1985

This is a communication from the examiner in charge of your application
COMMISSIONER OF PATENTS AND TRADEMARKS
1. THIS IS AN ATTACHMENT TO THE NOTICE OF ALLOWANCE AND BASIC ISSUE FEE DUE, PTOL 85.
2. All the claims being allowable, PROSECUTION ON THE MERITS CLOSED in this application. If not attached hereto, a Notice of Allowance or other appropriate communication will be sent in due course.

B. Formal drawings are now required and MUST BE SUBMITTED WITHIN THE THREE MONTH STATUTORY PERIOD SET FOR PAYMENT OF THE BASE ISSUE FEE IN THE "NOTICE OF ALLOWANCE AND BASE ISSUE FEE DUE" (PTOL-85). Note that the statute does not permit

extension of the three months

a). The claims are allowed in view of:

b) Applicant's communication filed June 11, 1984.

c) The attached Examiner's Amendment.

d) **The allowed claims are 5 and 6.**

4. Note attached NOTICE OF REFERENCES CITED, PTO -892 which is part of this communication. The listed references are considered to be permitted to the claimed invention, but the claims are deemed to be patentable thereover.

5. Note attached LIST OF ART CITED BY APPLICANT, PTO -1449.

/s/_____

John D. Yasko

Examiner

Art Unit 336

UNITED STATES DEPARTMENT OF COMMERCE

Patents and Trademark Office

ORDER GRANTING/DENYING REQUEST FOR REEXAMINATION

McNair U.S.Patent 4,285,343

ReExamination No. 90/004,908

Date mailed 04/15/98

The request for reexamination is DENIED.

In due course, a refund under CFR 1.26(c) will be made to requester (listed below if not patent owner) by Treasury check.

ReExamination No. 90/004,908

Art Unit 3734

Decision

No substantial new question of patent ability is raised by the request for reexamination and prior art cited therein for the reasons set forth below.

The newly cited U.S. patent 4,285,343 issued to McNair does not raise a substantial new question of patent ability as to claims 1 and 2 of the requesters U.S. Patent 4,557,720 issued to Hemphill.

The claims of the Hemphill patent for which reexamination is requested , require "A vaginal swab comprised of...a pair of hinged housing segments defined by a plurality of frangible seams...in which an absorbent member is enclosed therein." And in claim 2, "a vaginal swab...including a moveable inner and outer case member;" a core member...including at least one layer of porous material

secured to a core member, and housing means for supporting and enclosing said core member, said core member being secured to said housing means, having at least two portions moveable relative to one another between first and second positions for enclosing said core member when is said first position and for both exposing said core member and the said porous material secured thereto and for forming a handle for said swab when in said second position."

The U.S. patent to McNair discloses none of the structural features recited, supra. Further, the McNair patent is neither relevant under 35 U.S.C. 102 nor U.S.C. 103. Accordingly, since the newly submitted prior art McNair presents no substantial new question of patent ability, the request for reexamination is DENIED.

J. Yasko:lf /s/_____)

703 308-2986

April 3, 1998

UNITED STATES DEPARTMENT OF COMMERCE

Patents and Trademark Office

ORDER GRANTING/DENYING REQUEST
FOR REEXAMINATION
Serial Number 90/004987
Patent under reexamination : 4,557,720
Date mailed 07/06/98
Art Unit 3735

The request for reexamination has been considered. Identification of the claims, the references relied on, and the rationale supporting the determination are attached.
Attachment(s); PTO-892.
The request for reexamination is GRANTED.
Serial Number 90/004987
Art Unit 3735

A substantial new question of patent ability affecting claim 2 of United States Patent Number 4,557,720 is raised by the request for reexamination.

Extensions of time under 37 CFR 1.136(a) will not be permitted in these proceedings because the provisions of 37 CFR 1.136 apply only to "an applicant" and not to parties in a reexamination proceeding. Additionally, 35 U.S.C. 305 requires that reexamination proceedings "will be conducted with special dispatch" (37 CFR 1.550 (a)). Extensions of time in reexamination proceedings are provided for in 37 CFR 1.550(c).

The request for re-examination indicates that the patent to Srininvasan et al. . (39735567) may be relevant to claim 2

and the examiner feels that further consideration of this reference is warranted as it was not considered during prosecution of patent #4,557,720. The request also presents arguments as to why claim 2 is patent able over the patent to Srininvasan et al. . (3973567).

It is agreed that the reference to Srininvasan et. al. raises a substantial new question of patent ability with respect to claim 2. Srininvasan et al.., has structure that may read on claim 2 such as a core member surrounded by a layer of porous material, an outer housing, and housing means with 2 positions (one position that protects the core member and another position that exposes the core member for use). For these reasons the examiner considers that there is a substantial new question of patent ability with respect to claim 2 versus the patent to Srininvasan et. al.

("s/_____)
John G. Weiss
Supervisory Patent Examiner
Group 3700

D.R. (Initials)
Assistant Examiner, Sector 3700

UNITED STATES DEPARTMENT OF COMMERCE

Patents and Trademark Office

NOTICE OF INTENT TO ISSUE

REEXAMINATION CERTIFICATE

Examination has been terminated in this re-exam proceeding and a certificate will be issued in due course in view of patent owner's communication filed on 7/14/98; 7/11/98 and 7/24/98.

The Reexamination Certificate will indicate the following::

Change in the Specification : No

Change in the Drawings: No

Status of the Claims : Patent claims confirmed 1,2.

Note attached statements of reasons for patent ability and/or confirmation. Any comments considered necessary by patent owner regarding reasons for patent ability and/or confirmation must be submitted promptly to avoid processing delays. Such submissions should be labeled: "Comments on Statement of Reasons for Patent ability and/or Confirmation".

("s/_____)

John G. Weiss

Supervisory Patent Examiner

Group 3700

cc. Requestor

Re-exam no. 90/004987 Date mailed 10/07/98
Art Unit 3735

STATEMENT OF REASONS FOR
PATENT ABILITY AND/OR CONFIRMATION

The following is an examiner's statement of reasons for patent ability and/or confirmation of the claims found patent able in this reexamination proceeding:

Claim 1 of the patent to Hemphill (4557720) is considered patent able over the patent to Srininvasan et al. (3973567) because Srininvasan simply does not disclose the claimed structure, such as an open end opposite a closed end, an annular band, and frangible seams.

Claim 2 of the patent to Hemphill (4557720) is considered patent able over the patent to Srininvasan et al. (3973567) because Srininvasan does not disclose the housing means of Hemphill and does not disclose structure that could be considered equivalent to the housing means of Hemphill. In re Donaldson Co., 16 F.3d. 1189, 29 USPQ2d 1845 (Fed. Cir. 1994).

Any comments considered necessary by PATENT OWNER regarding the above statement must be submitted promptly to avoid processing delays. Such submission by the patent owner should be labeled: "Comments on Statement of reasons for Patent ability and/or Confirmation " and will be placed in the reexamination file.

2. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Dennis Ruhl whose telephone number is

(703) 308-22-62.

("s/_____)

Johnson G. Weiss

Supervisory Patent Examiner

D.R. (Initials)September 1, 1998 Group 3700

REEXAMINATION CERTIFICATE (3712th)

United States Patent [19]

Hemphill

[54] **VAGINAL APPLICATOR**

[76]Inventor Allegra D. Hemphill, 6217 Charnwood Dr., Rockville, Md. 20852

Reexamination Request: No. 90/004.987. May 22, 1998

Reexamination Certificate for:

Patent No. **4,557,720**

Issued: **Dec. 10. 1985**

Appl. No. **619,684**

Filed: **Jun. 11, 1984**

Related U.S. Application Data

[62] Division of Ser. Bo. 434,828 Oct. 18, 1982, abandoned.

051] Int. Cl. A61B 10/00

[11] **B1 4,557,720**

[45] Certificate Issued **Jan. 26,1999**

[52] U.S. Cl. 604/1; 401/77; 401/78

[56] **References Cited**

U.S. PATENT DOCUMENTS

3,973,567 8/1976 Srininvasan et al. 604/386

Primary Examiner -John Weiss

[57] **ABSTRACT**

A disposable vaginal refresher or swab comprised of an outer container for enclosing an inner, fairly rigid core member about which an adsorbent layer is secured. The outer container when removed exposes the adsorbent covered

member or allows that member to be moved out of the container into an operable position. The outer container also forms the handle of the disposable swab element.

B1 4,557,720

REEXAMINATION CERTIFICATE ISSUED UNDER 35 U.S.C. 307

NO AMENDMENTS HAVE BEEN MADE TO THE PATENT.

AS A RESULT OF REEXAMINATION IT HAS BEEN DETERMINED THAT:

The patentability of claims **1** and **2** is confirmed.

FILED
DEC 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

Case Number 06-421

IN THE

Supreme Court of the United States

ALLEGRA D. HEMPHILL

Petitioner,

v.

THE PROCTER & GAMBLE COMPANY

and KIMBERLY - CLARK CORPORATION,

Respondent(s).

ON PETITION FOR REHEARING
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR REHEARING

Ms. Allegra Hemphill
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(301) 897 - 2030

QUESTION PRESENTED FOR REVIEW

Is the statute Title 35 United States Code, Section 112, and more specifically, the patent law Title 35 U.S.C. §112, ¶2 relevant law in patent cases?

PARTIES TO THE PROCEEDING

All parties to this proceeding are identified in the caption. Kimberly-Clark Corporation and The Procter & Gamble Co. are corporations and there is no other parent or publicly held company owning 10% or more of the corporation's stock. [1]

---

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Statutes

Title 35 United States Code, Section 112

Title 35 U.S.C. §112, ¶2, provides:

"The specification shall conclude
with one or more claims particularly pointing out
and distinctly claiming the subject matter
which the applicant regards are her invention." .....*passim*

United States Patents and Trademark Office

Hemphill, United States Letters Patent 4,557,720

CLAIM 1, Col. 6, line 1- Col. 7, line 5, provides as follows:

1. A vaginal swab comprised of

an outer housing having a closed and open end on opposing ends thereof,

said housing including an annular band defining said open end and a plurality of frangible seams that together define a pair of removable members and a pair of housing segments hingably secured to said annular band following removal of said removable members,

a swab core member having a predetermined exterior shape,

said core member having an annular base with an outer diameter equal to the inner diameter of said annular band and an adsorbent member secured to said core member, said core member being secured within said housing so that said adsorbent member is enclosed therein.

CLAIM 2, Col. 7, line 6 -Col. 8, line 10, provides as follows:

2. A vaginal swab comprising

an outer housing including an inner case member and an outer case member at least part of which is connected to and said overlies said inner case member;

a core member, at least one layer of porous material secured to said core member, and housing means for supporting and enclosing said core member, said core member being secured to said housing means, having at least two portions movable relative to one another between first and second positions for enclosing said core member when in said first position and for both exposing said core member and the said porous padding secured thereto and for forming a handle for said swab when in said second position.

REFERENCE MATERIALS

American Heritage Dictionary (3d ed. **1992**);

Dorland's Medical Dictionary (28th ed. **1994**).

Webster's New Dictionary, **(1979)**

To the Honorable Supreme Court Justice(s):

The QUESTION PRESENTED FOR REVIEW, was specifically about whether the patent law Title 35 U.S.C. §112, ¶2 is relevant law in patent cases?

On November 27, 2006, I understand the petition for writ of certiorari is denied. For clarification, does this mean the statute Title 35 U.S.C. 112, is not relevant law in a patent case?
The statute Title 35 U.S.C. §112, ¶2 reads:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as her invention.

This was relevant law when I earned, and obtained my United States Letters Patent 4,557,720 on December 10, 1985. This above law enacted by Congress was considered mandatory law in 1985. If the law is still relevant in this year of December 2006, it requires Congress enforce their own laws because it is not being applied or enforced by the federal judges in the district court of Maryland, or, in the court of appeals. My petition is reasonable:

In federal court, claims in my 1985 United States Letters Patent 4,557,720 were decided by a 1994 dictionary not available to the applicant in 1985. The 1994 dictionary was not in print in 1985. The dictionary I consulted, had to be, before 1985. The 1979 *Webster's New Collegiate Dictionary* actually available to me, as the applicant and patentee, was dated before the patent application was filed in 1982. (The Court's task [is to ascertain] the meaning of claim terms to one of ordinary skill in the art **at the time of the invention**.) *Moba v. Diamond Automation Inc.*, 325 F3d. 1306,1315 (Fed. Cir. 2003).

The lower court's 1994 dictionary as a reference provides full discretionary power which is carte blanche. [2] Broadening the claim, in this manner, requires this Court to remand the case to the court of appeals for further determinations about the materials used, or enforce the relevant law for the applicant to point to and distinctly claim the kind and/or type of materials used, through the prior art.

2

The Hemphill, United States Letters Patent 4,557,720 issued in **1985** which is earlier than the court's reference.
The court's reference material was dated later in the
American Heritage Dictionary (3d ed. **1992**);
and also in *Dorland's Medical Dictionary* (28th ed. **1994**).

The federal circuit judges are rejecting the way the patent law reads. The above law reads for the court to interpret the claims 'as the applicant regards her invention' which specifically requires the applicant to point to and distinctly claim *her invention.* The lower court continues to be 'in denial' about the significant bearing the patentee has upon the invention. By misquoting the law so that it reads: 'as the court regards the invention' requires the court to be more forthcoming about the materials used in the 1994 dictionary. The Supreme Court said in *Warner-Jenkins Co. v. Hilton Davis Chemical Co.*, 520 US 17, 18 (1997): "Title 35 U.S.C. §112, ¶2 is the requirement for a patentee to specifically claim the covered invention." This is settled law. The court's minor change in the law from 'as the applicant regards her invention' to 'as the court regards the invention', is so very wrong because the district judge seeks to replenish the known prior art structure in the patent with unknown structure in a 1994 dictionary by *misrepresenting Markman* (because claim construction is a matter of law for the court to decide). *Markman v. Westview Instruments, Inc.*, 52 F3d. 967, (Fed. Cir. 1995) 979 (en banc), aff'd. reads: "Because claim construction is a matter of law, the construction given the claims is reviewed, *de novo*, on appeal". Knowingly or unknowingly, this minor change in Title 35 U.S.C. §112, ¶2 creates ambiguity in places where it did not exist before:

> Is the stick as defined by the 1994 dictionary definition, long and slender like a piece of gum, or does the court

> intend to override the PTO decision about the wooded cudgel in the prior art McNair patent? Is the term 'fairly rigid' like 70 lb. weight paper in comparison to 24 lb. weight paper; is the core member made of tag board or corrugated cardboard; can it be made of plastic? etc.

These questions must be answered by the court, because the 1994 dictionary simply does not provide the information. All of these questions were answered by the applicant in the Hemphill United States Letters Patent 4,557,720 in the United States Patent Trademark Office (PTO) in 1985. In 1985, the law in Title 35 U.S.C. §112, ¶2 meant for the applicant to show how she regards her ***invention***. It is unreasonable to overlook this law and not enforce the law, especially if the law is relevant.

The prior art structure in the United States Letters Patent 4,557,720, is, the true invention. If the court continues to reject the law and refuses to allow the applicant the opportunity to point to structure that is found in my Letters Patent 4,557, 720, then the court must be more forthcoming with the specifics about 1994 dictionary and the materials used. To date, the lower court judges have not held any discussions for an understanding. Closing the case prematurely, before applying the law, was the standard procedure in the district court of Maryland. In the fourth circuit prior art is not considered. This procedure conflicts with ninth circuit law where the court of appeals oversees prior art structure and recognizes the importance of enforcing Title 35 U.S.C. §112, ¶2: ([e]valuations of the prior art requires consideration).

Techsearch, LLC v. Intel Corp. 286 F.3rd. 1360 (Fed. Cir. 2002)1369. Clearly, the protocol in the fourth circuit does not seem fair or right. It is not the example of (the court's inherent search for the truth as the basic building by which the judicial process maintains its credibility with the fabric of our society.) *Techsearch, LLC v. Intel Corp.* 286 F.3rd. 1360 (Fed. Cir. 2002 1378.

Title 35 U.S.C. §112, ¶2 was supreme law of the land in 1985. Should this law be relevant in this year of 2006, it reopens the case. Replenishing the prior art structure in my 1985 United States Letters Patent 4,557,720 with structure in a 1994 dictionary requires more specifics about the materials used, otherwise we all face the consequence of upsetting the balances in the United States Patent and Trademark Office. In the Supreme Court, you said: ("The Federal Circuit should be extremely reluctant to upset the basic assumptions of the PTO and without substantial reason for doing so.) *Warner-Jenkins Co. v. Hilton Davis Chemical Co.*, 520 US 17, 32 (1997). Either the Supreme Court or Congress must reinforce the real purpose of the lower court is to apply the law. The law did not intend for the court to disregard the invention, simply by refusing to read the patent. Of course, patents are laborious to read, and reviewing prior art is tedious, but it must be done for the public to have a fair and complete understanding. This is reasonable.

My question is specifically about the patent law Title 35 U.S.C. §112, ¶2 being relevant. Patents are distinct, whereas, the 1994 dictionary does not specify any materials used, nor does it provide a 'unique description'. Please understand what the court has *given* in claim construction is carte blanche, as an authority *over* the PTO, and the higher should focus primarily on what the applicant knows is legally claimed, rightfully.

Congress will know whether or not the law is relevant but a federal judge in the US Court of Appeals for the Federal Circuit is trained in the law to know how to read patents. Title 35 U.S.C. §112, ¶2 is, and has always been, mandatory law in patent cases. (The federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.). *Quakenbush v. Allstate Insurance Co.*, 517 US 706 716 (1996). Remanding the case with a gentle reminder that 'appellate courts enforce the guarantees recognized and enacted by Congress' is reasonable because a federal judge never "sat" in a courtroom which explains why this case was not heard in a court of law and the patent law was not enforced in a patent case. There has been no visible sign of a district judge or judge in the court of appeals and there is no relevant law Title 35 U.S.C. §112, ¶2 applied in this case. For all we know, defense attorneys or clerks could have decided this case which is unthinkable. Clerks would not know if mandatory law in 1985 is still relevant in 2006. Neither the clerks, nor defense attorneys uphold to defend the constitution in the way a federal judge is expected to enforce the laws enacted by

Congress.[3]

As the applicant and patent owner, I know how to read my patent and I understand the prior art structure in my patent. Reviewing the structure in my patent, ***is***, to understand my true invention. Before 1982, I became fully aware the components/parts in my invention work well together. Once all portions are put together, my invention made a difference at a time when people here, in American, were experiencing Toxic Shock Syndrome. These companies needed an innovation but they did not know how to put the component parts together. Courts cannot feed into the greed of companies that don't believe they have to ask for permission from the patentee, and they do not offer to make amends. The solution to the problem is to fully expect our patents will be honored by the honorable. After all, how can we expect our patents will be respected abroad, when we show no regard for the patent system, here, at home.

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[3] I had to believe the system works. My course of action has been a matter of economics because patent attorneys do not take patent cases on a contingency basis. Court costs for an attorney to file a patent case in the district court is $300,00.00 and five million dollars on appeal. This 'going rate' is ridiculous for inventors that must pay the patent maintenance fees plus, the sacrifices made for obtaining a United States Letters Patent.

CONCLUSION

Rehearing, determines whether or not the patent law in Title 35 U.S.C. §112, ¶2 is relevant.

Respectfully submitted,

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December 21, 2006

SUPREME COURT RULE 44.2 CERTIFICATE

Please grant this petition for rehearing. It is presented in good faith and not for delay. Grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented in the petition for writ of certiorari.

Respectfully submitted,

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